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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions for Review of Action and Failure to Act by the California Regional Water Quality Control Board, Los Angeles Region, in Adopting Order No. 01-182 and Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles and the Incorporated Cities Therein (excluding the City of Long Beach) by:

THE CITIES OF ARCADIA, BALDWIN PARK, BELL, BELL GARDENS, BELLFLOWER, CERRITOS, CLAREMONT, COMMERCE, COVINA, DIAMOND BAR, DOWNEY, GARDENA, HAWAIIAN GARDENS, HAWTHORNE, IRWINDALE, LA MIRADA, MONTEBELLO, PARAMOUNT, PICO RIVERA, POMONA, ROSEMEAD, SAN GABRIEL, SAN MARINO, SANTA FE SPRINGS, SIERRA MADRE, SIGNAL HILL, SOUTH PASADENA, TEMPLE CITY, VERNON, WALNUT, WEST COVINA, WHITTIER and THE BUILDING INDUSTRY ASSOCIATION OF SOUTHERN CALIFORNIA, a Non-Profit Mutual Benefit Corporation, and THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, a Non-Profit Mutual Benefit Corporation, and THE CONSTRUCTION INDUSTRY COALITION ON WATER QUALITY

continued. . .

SWRCB/OCC File Nos.: A-1448 and A-1448(a) through (e)

RESPONSE OF THE REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION TO ISSUES IDENTIFIED IN FEBRUARY 25, 2002, LETTER FROM THE STATE WATER RESOURCES CONTROL BOARD CONCERNING PETITIONS CHALLENGING REGIONAL BOARD ORDER NO. 01-182 ORDER NO. 01-182 (NPDES No. CAS004001)

1 THE CITY OF ARTESIA, THE CITY OF
2 BEVERLY HILLS, THE CITY OF
3 CARSON, THE CITY OF MONROVIA,
4 THE CITY OF NORWALK, THE CITY
5 OF RANCHOS PALOS VERDES, AND
6 THE CITY OF WESTLAKE VILLAGE
7
8 THE CITY OF LOS ANGELES
9
10 THE COUNTY OF LOS ANGELES
11
12 LOS ANGELES COUNTY ECONOMIC
13 DEVELOPMENT CORPORATION, THE
14 CITY OF ALHAMBRA, THE CITY OF
15 COMPTON, THE CITY OF EL
16 SEGUNDO, THE CITY OF INDUSTRY,
17 THE CITY OF LAKEWOOD, THE CITY
18 OF LAWNSDALE, THE CITY OF
19 LOMITA, THE CITY OF SANTA
20 CLARITA AND THE CITY OF
21 TORRANCE
22
23 PLAYA CAPITAL COMPANY
24
25
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27
28
Petitioners

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1 **I. INTRODUCTION**

2 On December 13, 2001, the California Regional Water Quality Control Board, Los
3 Angeles (Regional Board) unanimously adopted the Los Angeles County municipal separate
4 storm sewer system (LA MS4) permit. The permit was the third iteration of the LA MS4 permit,
5 and like all successive MS4 permits, the LA MS4 permit incorporates incremental best
6 management practice (BMP) provisions to reflect the Clean Water Act requirement to “reduce the
7 discharge of pollutants to the maximum extent practicable” and to “effectively prohibit non-
8 stormwater discharges into the storm sewers.” (33 U.S.C. § 1342(p)(3).) The new and refined
9 permit requirements—requirements that the Regional Board adjusted to incorporate the
10 substantial input of dischargers—reflect the fact that prior efforts by the MS4 dischargers have
11 continued to allow highly polluted storm water discharges into the region’s waters.

12 Petitioners (who include municipalities, a private developer, a business development
13 corporation, and trade associations for the building industry) challenge the actions of the Regional
14 Board in adopting waste discharge requirements for municipal storm water discharges in Los
15 Angeles County. Petitioners object to the requirements for various substantive and procedural
16 reasons. In essence, Petitioners contend that the Regional Board has no basis in law or fact to
17 adopt requirements for various program elements contained in the LA MS4 permit. Certain
18 petitioners also contend that they were denied due process because they were not provided
19 additional notice and allowed more time to review technical documents prepared and changes
20 made before action by the Regional Board at its December 13, 2001, meeting.

21 For all the challenges to the LA MS4 permit, the Petitioners have not challenged the
22 evidence underlying the Regional Board’s findings—findings that amply support the permit
23 provisions. The Regional Board’s findings about (i) the toxic makeup of urban storm water
24 discharges, (ii) the sources of such pollution, (iii) the failings of the dischargers’ current efforts
25 under prior permits, and (iv) the dramatic effects storm water has on the region’s coastal
26 economies are documented in Findings B.1-11 of the Regional Board’s permit. These findings on
27 the highly polluting, impairing nature of storm water discharges compelled the Regional Board to
28 take concrete steps to identify specific, additional activities required by the dischargers.

1 The Regional Board acted within the broad powers granted by Congress in regulating
2 discharges from an MS4. Storm water discharges from large MS4s to waters of the United States
3 without permits are illegal under the federal Water Pollution Control Act (“Clean Water Act”).
4 Once such discharges are regulated under an MS4 permit, the Permittees must implement a
5 comprehensive storm water management program to reduce pollutants in storm water discharges
6 from the MS4 to the maximum extent practicable (MEP) and, consistent with State Water
7 Resources Control Board (State Board) precedential orders, to meet water quality standards.

8 While the MEP standard is flexible, the Regional Board must provide specific, detailed
9 requirements in its MS4 permit if the Clean Water Act’s progressive BMP-based approach to
10 MS4 permitting is to have any enforcement mechanism. Further, the LA MS4 permit contains the
11 requisite flexibility to allow dischargers to identify substitute BMPs or provisions that they may
12 find more cost effective, but at least as environmentally effective, in achieving reductions to the
13 MEP and, where necessary, in achieving water quality standards. The Regional Board is lawfully
14 obligated to follow the requirements of Federal and State law and exercise reasoned judgment in
15 adopting and enforcing measures protective of receiving water quality. Thus, the Regional
16 Board, as the permitting authority, is granted the charge to enumerate objective measures of
17 compliance and incorporate storm water effluent limitations in the MS4 permit to ensure
18 enforceability of permit requirements.

19 A careful review of the entire record shows that the Regional Board lawfully executed its
20 legal duties based on the record before it. The State Board should uphold the LA MS4 permit in
21 its entirety.

22 **II. BACKGROUND**

23 The Legislature created the Regional Board and gave it the responsibility to preserve and
24 enhance water quality in the Los Angeles Region for the benefit of present and future generations.
25 The Regional Board carries out this mission through a broad range of activities to protect ground
26 and surface waters within its jurisdiction. By requiring the Regional Board to carry out the
27 requirements of the Clean Water Act, one of the responsibilities the Legislature compelled the
28 Regional Board to address is storm water discharges from large MS4s.

1 **A. LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT HISTORY**

2 **1. BACKGROUND - LOS ANGELES COUNTY MS4**

3 **a. Los Angeles County MS4 Permit History**

4 On June 18, 1990, the Regional Board adopted the first national pollutant discharge
5 elimination system (NPDES) permit for Storm Water/Urban Runoff Discharged in Los Angeles
6 County (Order No. 90-079). This first-generation permit was issued on a system-wide basis for
7 all the cities in Los Angeles County and the County of Los Angeles. The 1990 permit was
8 challenged regarding its alleged failure to include specific water quality objectives and was
9 upheld on May 16, 1991 in a decision issued by the State Board.¹

10 The first generation permit required the Los Angeles County Flood Control District, the
11 County of Los Angeles and the incorporated cities in Los Angeles County to implement storm
12 water pollution controls including amending ordinances, optimizing existing pollutant controls
13 such as street sweeping, construction site controls, and other requirements to reflect MEP. The
14 Regional Board required all Permittees to implement a minimum list of 13 BMPs for consistency
15 across Los Angeles County. The 1990 permit was issued on a system-wide basis due to the highly
16 interconnected storm drain system serving a population well in excess of 100,000 inhabitants. An
17 NPDES permit is valid for a five-year period after the date is issued.²

18 The LA MS4 permit was reissued on July 15, 1996, and made consistent with EPA
19 regulations for MS4s issued November 16, 1990.³ The 1996 LA MS4 permit⁴ required model
20 programs to be developed and implemented by the Permittees for Public Information and Public
21 Participation, Industrial/Commercial Activities, Development Construction, Illicit Connections
22 and Illicit Discharges, Public Agency Activities, and Development Planning. These model
23 programs were intended to be dynamic and expected to change with time to reduce pollutants in
24 storm water as more information on storm water impacts became available.

25 The second generation MS4 permit included provisions for the dischargers to develop,

26 _____
27 ¹ State Board Order No. WQ 91-04; See also, State Board Order No. WQ 91-03.

² 40 C.F.R § 122.46(a).

³ 40 C.F.R. § 122.26(d). See 55 Fed.Reg. 47990 et seq. (Nov. 16, 1990); 55 Fed. Reg. 48072, 48073, Appendix F.

28 ⁴ Regional Board Order 96-054 [Administrative Record {AR} Vols. 10-11, Item 328 {Board Meeting Agenda Item #10 Contains Prior Permit}].

1 with the approval of the Executive Officer, a Standard Urban Storm Water Mitigation Plan
2 (SUSMP) to be part of the New Development Planning model program. The Regional Board
3 Executive Officer issued the Final Board SUSMP on March 8, 2000, together with a “Staff
4 Report and Record of Decision – Supplement” and “Board Resolution” (No. R-00-02). Several
5 of the current Petitioners challenged the SUSMP provisions developed under the second
6 generation permit via a petition to the State Board. The State Board in large part upheld the
7 action of the Regional Board in approving the SUSMP in State Board Order No. WQ 2000-11
8 (LA SUSMP Order). Based on limiting language in the second generation MS4 permit, the State
9 Board set aside applicability of the SUSMP to projects in environmentally sensitive areas and to
10 non-discretionary projects until the Regional Board considered the matter during permit
11 reissuance. Retail Gasoline Outlets (RGOs) were excluded from application of the numerical
12 mitigation criteria until such time the Regional Board developed proper justification.

13 On January 31, 2001, the Los Angeles County Department of Public Works submitted an
14 application for renewal of the Los Angeles County MS4 permit in the form of a Report of Waste
15 Discharge (ROWD) for Los Angeles County and the incorporated cities, except for the City of
16 Long Beach.⁵ This application started the process for reissuance of the permit, and culminated in
17 the adoption of the Regional Board’s third generation permit for Los Angeles County.

18 In general, MS4 permits such as the LA MS4 permit do not have numeric effluent limits
19 for storm water discharges from the MS4. Rather, the Regional Board relies on an iterative,
20 BMP-based approach implemented by the dischargers to reduce the discharge of pollutants in
21 storm water to the MEP. Where water quality standards are not being met, the Regional Board
22 expects the dischargers to propose and to implement additional BMPs in a continuing effort to
23 meet water quality standards. Therefore the dischargers’ development and implementation of the
24 special provisions (i.e. the model programs and their enhancements) are of paramount importance
25 to permit compliance and protecting water quality in the region.

26 The “Special Provisions” in the LA MS4 Permit are - for the most part - based on the
27 Permittees’ existing model programs, which they’ve been implementing since at least 1999. The

28 _____
⁵ AR Vol. 1, Items 1-2.

1 incremental changes Regional Board staff has made to the third generation permit include greater
2 specificity and better measures to determine implementation. Some of the Permittees are already
3 meeting these performance measures. The performance measures in the permit help to clarify the
4 MEP compliance expectations and set a consistent bar for all Permittees.

5 ***B. WATER QUALITY AND STORM WATER IN THE LOS ANGELES REGION***

6 The LA MS4 permit covers unincorporated areas in the Los Angeles County and 84
7 incorporated cities. The storm drain structure consists of thousands of catch basins, thousands of
8 miles of underground storm drains, as well as open channels, all owned and operated separately
9 by the dischargers. The length of the system exceeds 4,300 miles. This system acts as a conduit
10 for the discharge of storm water and pollutants in storm water to surface waters in the region.

11 The water quality impacts of urbanization and urban storm water discharges have been
12 summarized by several recent EPA reports.⁶ Urbanization causes changes in hydrology and
13 increases pollutant loads which adversely impact water quality and impairs the beneficial uses of
14 receiving waters. Increases in population density and imperviousness result in changes to stream
15 hydrology including:

- 16 (i) increased peak discharges compared to predevelopment levels;
17 (ii) increased volume of storm water runoff with each storm compared
18 to pre-development levels;
19 (iii) decreased travel time to reach receiving water;
20 (iv) increased frequency and severity of floods;
21 (v) reduced stream flow during prolonged periods of dry weather due
22 to reduced level of infiltration;
23 (vi) increased runoff velocity during storms due to a combination of
24 effects of higher discharge peaks, rapid time of concentration, and
25 smoother hydraulic surfaces from chanellization, and
26 (vii) decreased infiltration and diminish groundwater recharge.

27 The LA County MS4 program conducts monitoring to:

- 28 • quantify mass emissions for pollutants,

⁶ *Report to Congress on the Phase II Storm Water Regulations* (USEPA 1999) [AR, Vol. 14, Item 70]; *Storm Water Phase II Report to Congress* (USEPA 1995); *Coastal Zone Management Measures Guidance* (USEPA 1992); *Environmental Impacts of Storm Water Discharges* (USEPA 1992).

- identify critical sources for pollutants of concern in storm water;
- evaluate BMP effectiveness, and
- evaluate receiving water impacts.

The monitoring indicates that instream concentrations of pathogen indicators (fecal coliform and streptococcus), heavy metals (such as Pb, Cu, Zn,) and pesticides (such as diazinon) exceed state and Federal water quality criteria.⁷ The mass emissions of pollutants to the ocean are significant from the urban Watershed Management Areas (WMAs) such as the Los Angeles River WMA, Ballona Creek WMA, and Coyote Creek WMA with the Los Angeles River WMA providing more than seventy percent of the loadings. Critical sources data for facilities (such as auto-salvage yards, primary metal facilities, and automotive repair shops) showed that total and dissolved heavy metals (Pb, Cu, Zn, and Cd), and total suspended solids (TSS) exceeded State and Federal water quality criteria by as much as a hundred times.

The results are consistent with a limited term study conducted by the Regional Board to characterize storm water runoff in the Los Angeles region before the issuance of the first MS4 permit.⁸ Storm water runoff data from predominant land uses showed similar patterns. Light industrial, commercial and transportation land uses showed the highest range of exceedances. A pesticide (diazinon) showed higher ranges from residential land use. The data for polycyclic aromatic hydrocarbons (PAHs), a known pollutant of concern in urban storm water runoff, is inconclusive but improved analytical methods may yield more definitive results in the current permit term. Receiving water impacts studies found that storm water discharges from urban watersheds exhibit toxicity attributable to heavy metals. Biosurveys of the sea-bottom showed bioaccumulation of toxicants. Sediment analysis showed higher concentrations of pollutants such as Pb and PAHs than rural watersheds (2 to 4 times higher). In addition, toxicity of dry weather

⁷ Los Angeles County 1998-1999 Stormwater Monitoring Report, Los Angeles County Department of Public Works (1999). Data summarizes results of storm water monitoring for the most recent year and the past five years. Los Angeles County 2000-2001 Stormwater Monitoring Report, Los Angeles County Department of Public Works (2001) [AR, Vol. 17, Item 118]. Los Angeles County 1994-2000 Integrated Receiving Water Impacts Report, Los Angeles County Department of Public Works (2000) [AR, Vol. 16, Item 117].

⁸ *Storm Water Runoff in Los Angeles and Ventura Counties, Final Report* (1988), California Regional Water Quality Control Board, Los Angeles, SCCWRP Contribution C292. This study found the highest mean concentrations of pollutants of concern such as heavy metals in the urban watershed rivers and that they contributed significant loads to the ocean.

1 flows was observed with the cause of toxicity undetermined.⁹ Previous studies have found
2 chemical concentration of pollutants that exceed state and Federal water quality criteria in storm
3 drains flowing to the ocean,¹⁰ and that there are adverse health impacts from swimming near
4 them.¹¹

5 Studies on the economic impacts of watershed protection indicate that storm water quality
6 management has a positive or at least neutral economic effect while greatly improving the quality
7 of surface waters.¹² The rising costs for homebuilders are more due to increased amenities that
8 builders install in homes and the cost of building materials, and not because of environmental
9 compliance.¹³

10 ***C. APPLICABLE FEDERAL AND STATE AUTHORITY***

11 *1. Federal Authority*

12 The Federal Water Pollution Control Act was adopted in 1948, amended in 1972, and
13 amended in 1977 as the Clean Water Act of 1977. Congress enacted the Clean Water Act “to
14 restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁴
15 The Clean Water Act established the National Pollutant Discharge Elimination System (NPDES)
16 that required permits for any discharge of pollutants from a point source pursuant to section 402
17 of the Clean Water Act.¹⁵ The Clean Water Act authorizes the United States Environmental
18 Protection Agency (EPA) or an authorized State to implement an NPDES permit program.¹⁶

19 In 1987, Congress amended Section 402 of the Clean Water Act in recognition of the
20

21 ⁹ *Toxicity of Dry Weather Flow from the Santa Monica Bay Watershed*, Bay, S. et al (1996), Bull. Southern
22 California Acad. Sci. 5(1), pp. 33-45. The paper describes preliminary results on dry weather toxicity which have
23 been confirmed by the MS4 monitoring program.

24 ¹⁰ *Chemical Contaminant Release into Santa Monica Bay, Final Report*, American Oceans Campaign, Santa Monica
(1993)

25 ¹¹ *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, Haile, R.W. et al. (1999),
26 Epidemiology 10: 355-363). The study found higher risks of respiratory and gastrointestinal symptoms from
27 swimmers.

28 ¹² *The Economics of Watershed Protection*, T. Schuler (1999), Center for Watershed Protection, Endicott, MD. The
article summarizes nationwide studies to support the statement that watershed planning and storm water management
provide positive economic benefits.

¹³ See, AR, Vol. 15, Item 73, *Building a Balance: Housing Affordability and Environmental Protection in the USA*.
Laquatra, J and G.L. Potter (2000), Electronic Green Journal.

¹⁴ 33 U.S.C. § 1251(a).

¹⁵ 33 U.S.C. § 1342.

¹⁶ 33 U.S.C. § 1342(a)(1) and (b).

1 threat from storm water runoff, to add subsection 402(p).¹⁷ Section 402(p) established a statutory
2 scheme for storm water runoff through NPDES permit requirements for municipal storm water
3 discharges from MS4s. Section 402(p) also “established deadlines by which certain storm water
4 dischargers must apply for permits, the EPA or states must act on permits and dischargers must
5 implement their permits.”¹⁸

6 2. *The California NPDES Permitting Authority*

7 A state may administer an NPDES program upon approval by EPA. Program approval
8 requires a state to submit a description of its program, a statement from the Attorney General to
9 the EPA, and a Memorandum of Agreement with EPA.¹⁹ The Administrator shall approve a state
10 program that conforms to the applicable requirements.²⁰ The State of California is one of forty
11 states with an approved State NPDES Program. California’s program has been in effect since
12 1973. The latest NPDES Memorandum of Agreement between the U.S. Environmental
13 Protection Agency and the State Board, approved by EPA on September 22, 1989, states as
14 follows:

15 The Chairman of the State Board and the Regional Administrator of the
16 EPA, Region 9 hereby affirm that the State Board and the Regional Boards
17 have primary authority for the issuance, compliance monitoring, and
18 enforcement of all NPDES permits in California including NPDES general
19 permits and permits for Federal facilities; and ...permits to dischargers for
20 which EPA has assumed direct responsibility pursuant to 40 C.F.R.
21 123.44. . . .

22 EPA has certified California’s NPDES programs and the Regional Board’s authority to issue
23 permits as part of the approved program. Water Code section 13377 specifically authorizes the
24 Regional Board to issue NPDES permits.²¹ The EPA has approved the regulatory scheme set
25 forth in the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) that establishes a

26 ¹⁷ 33 U.S.C. § 1342(p).

27 ¹⁸ *Natural Resources Defense Council v. U.S. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992).

28 ¹⁹ 33 U.S.C. § 1342(b); 40 C.F.R. § 123.21 et seq.

²⁰ 40 C.F.R. § 123.1(c).

²¹ “Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements ...which apply and insure compliance with all applicable provisions of the act and acts amendatory thereof or supplemental thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” Water Code § 13374 states: “The term “waste discharge requirements” as referred to in this division is the equivalent of the term “permits” as used in the Federal Water Pollution Control Act, as amended.”

1 comprehensive statewide program for water quality administered regionally, through the State
2 Board and the nine regional boards, within a framework of statewide coordination and policy.²²

3 3. Summary of Applicable California Regulatory Program

4 The Porter-Cologne Act is the controlling water quality law for California.²³ The State
5 Board and the nine Regional Boards implement the Act.²⁴ The Porter-Cologne Act and its
6 regulations include both general and specific sections for implementing the Clean Water Act
7 programs.²⁵ The Regional Boards adopt Regional Water Quality Control Plans (“Basin Plans”)
8 for each region.²⁶ The Basin Plan covering the area of LA MS4 permit, was adopted by the
9 Regional Board on June 13, 1994, was approved by the State Board on November 17, 1994, and
10 is a public document generally available. The Basin Plan specifically discusses the NPDES
11 permit program that regulates storm water runoff from land surfaces that flow into storm drains or
12 directly into natural waterbodies during rainfall. The principal means of regulating activities, that
13 may affect water quality and the principal means of implementing water quality control plans is
14 through issuance of waste discharge requirements that serve as NPDES permits.

15 Water Code section 13376 sets forth a discharger’s duties to obtain waste discharge
16 requirements.²⁷ Section 13376 is similar to relevant application provisions of the Clean Water
17 Act.²⁸ By prohibiting the “discharge of pollutants” except as in accordance with a state permit, in
18 the form of waste discharge requirements, section 13376 requires waste discharge requirements
19 for all discharges for which the Clean Water Act requires an NPDES permit.²⁹ State Board

20 ²² Water Code, § 13000 et seq.

21 ²³ Water Code, § 13000 et seq.

22 ²⁴ Water Code, §§ 174, 13200.

23 ²⁵ See Water Code, § 13370 et seq.

24 ²⁶ Water Code, § 13240.

25 ²⁷ . Section 13376 provides, in pertinent part: “Any person discharging pollutants or proposing to discharge pollutants
26 to the navigable waters of the United States within this state...shall file a report of such discharge in accordance with
27 he procedures set forth in section 13260....The discharge of pollutants...by any person except as authorized pursuant
28 to waste discharge requirements....is prohibited...” § 13376. The terms “discharge,” “pollutants,” and “navigable
waters,” as used in section 13376 and other provisions of Chapter 5.5 of the Porter-Cologne Act, have the same
meaning as in the Clean Water Act. § 13373. The term “waste Discharge requirements,” as used in Chapter 5.5. of
the Porter-Cologne Act, is the equivalent of the term “permits,” as used in the Clean Water Act § 13374.

²⁸ Compare Water Code, § 13376 and 33 U.S.C. §§ 1311, 1342.

²⁹ Any person discharging waste or proposing to discharge waste that could affect the quality of waters of the state,
must submit a *report of waste discharge* to the board. Water Code, § 13260. A “discharge of waste”, as used in the
Porter-Cologne Act provisions on waste discharge requirements, includes, but is not limited to , any “discharge or
runoff of a pollutant”, within the meaning of the Clean Water Act. (33 U.S.C. § 1323, 1362). Specific authority for

1 regulations provide that a report of waste discharge is the equivalent of an NPDES Permit
2 Application, and that reports of waste discharge for point source discharges to surface waters
3 shall be filed and processed in compliance with EPA's NPDES program regulations.³⁰

4 4. *No requirement of specific water quality impact analysis for permit issuance*

5 Importantly, there is no requirement in state or Federal law that either the EPA or the State
6 is required to obtain quantitative, empirical information on the impacts to water quality of the
7 discharges of pollutants or waste prior to the issuance of a permit to that discharger. A city with a
8 population exceeding 100,000, or an urbanized area with an interconnected storm drain system,
9 that owns or operates an MS4 is required to have a permit pursuant to EPA regulations
10 implementing Clean Water Act Section 402(p). The Clean Water Act requires EPA and the
11 States to regulate, through the issuance of NPDES permits, all discharges of pollutants to the
12 nation's waters.³¹ "A permit is required where the population figures are met or exceeded;
13 issuance is not conditioned on proving actual impacts to water quality."³²

14 The initial storm water regulations were based upon extensive studies, which documented
15 impacts on water quality from large and medium urban areas.³³ *In Natural Resources Defense*
16 *Council v. U.S. EPA*, the court rejected an exemption in the Clean Water Act for oil and gas
17 facilities where storm water was uncontaminated.³⁴ The Court noted:

18 ...by designating these light industries as a group that need only apply for
19 permits if actual exposure occurs, EPA impermissibly alters the statutory
20 scheme...no other classes of industrial activities are subject to the more
21 lenient "actual exposure" test. To require actual exposure entirely shifts
22 the burden in the permitting scheme. Most industrial facilities will have to
23 apply for permits and show the EPA or state that they are in compliance.
24 Light industries will be relieved from applying for permits unless actual
25 exposure occurs...The permitting scheme then will work only if these
26 facilities self-report, or the EPA searches out the sources and shows that

25 Clean Water Act Programs in the Porter-Cologne Act include the issuance and enforcement of waste discharge
26 requirements for both point and non-point sources. Waste discharge requirements may establish more stringent
27 requirements than those required or authorized by the Clean Water Act. Water Code, § 13377.

30 Cal. Code Regs., tit. 22, §§ 2235(b), 2235.1, 2235.2.

31 33 U.S.C. § 1342; *NRDC v. Costle*, 568 F. 2d 1369 (D.C. Cir. 1977).

32 State Board Order No WQ 95-2; 55 Fed. Reg. 48038 (Nov 16, 1990).

33 See *Natural Resources Defense Council v. U.S. EPA*, 966 F.2d 1292 (9th Cir. 1992).

34 *Id.*, at p. 1305.

1 exposure is occurring...[T]he regulations appear to contemplate
2 neither. . . .³⁵

3 To condition a permit on proving actual impacts to water quality alters the statutory scheme and
4 wrongly places the burden on the permitting agency instead of forcing the municipality to prove
5 that they are in compliance.³⁶

6 **III. ARGUMENT**

7 In light of the substantial evidence in the record and the broad discretion given the
8 Regional Board by state and federal law, the Regional Board's LA MS4 permit should be upheld
9 in its entirety. The Petitioners have mounted a broad scale attack on the permit, but in its
10 February 25, 2002, letter, the State Board limited the issues the State Board will consider based
11 on these petitions.³⁷ As a result, the Regional Board has limited this response, with certain
12 exceptions, to the issues raised in the February 25, 2002 letter.³⁸ In each respect, the issues raised
13 by the State Board do not require revisions to the Regional Board's LA MS4 permit.

14 **A. PERMITTEES ARE REQUIRED TO COMPLY WITH THE RECEIVING WATER 15 LIMITATIONS AND THE MEP STANDARD THROUGH AN ITERATIVE 16 PROCESS.**

17 The existing receiving water language sanctioned by the State Board and contained in the
18 LA MS4 permit affords adequate protection to dischargers, but the regional boards and
19 dischargers would benefit from additional guidance in carrying out the iterative process.

20 *1. Receiving Water Limitation Language is Necessary.*

21 The Regional Board has the authority to issue MS4 permits with receiving water
22 limitations. While it is true that waste discharge requirements and an MS4 permit allow the

23 ³⁵ *Id.*, at p. 1305.

24 ³⁶ In *NRDC v. U.S. EPA*, the court explained: "This case involves runoff from diffuse sources that eventually passes
25 through storm sewer systems and is thus subject to the NPDES permit program.... One recent study concluded that
26 pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a
27 leading cause of water quality impairment. 55 Fed.Reg. at 47.991 " *Id.* at 1295. "The Nationwide Urban Runoff
28 Program (NURP) conducted from 1978 through 1984 found that urban runoff from residential, commercial and
industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than
that from secondary treatment sewage plants. 55 Fed. Reg. at 47.991. A significant number of samples tested
exceeded water quality criteria for one or more pollutants. *Id.*, at p. 47, 992.

³⁷ Letter from Arthur G. Baggett, Jr. (Chair) to Petitioners' Counsel (Feb. 25, 2002).

³⁸ Given the Regional Board's reliance on the February 25, 2002 letter, to the extent the State Board decides to
address further issues either on its own motion or as raised in the petitions, the Regional Board requests an
opportunity to brief the issue before the State Board issues a draft order.

1 discharge of storm water, the discharge requirements must nonetheless meet specific
2 requirements. The Porter-Cologne Act requires waste discharge requirements to “implement
3 relevant water quality control plans”³⁹ The water quality control plan identifies the
4 beneficial uses to be protected and specifies the “water quality objectives reasonably required” to
5 protect those uses, along with “the need to prevent nuisance”⁴⁰

6 The various permit conditions and requirements to implement BMPs provide the
7 minimum conditions for the discharge of waste in conformance with the LA MS4 permit. The
8 conditions reflect the best professional judgment of the Regional Board in reducing the Clean
9 Water Act and the Porter-Cologne Act into effective permit conditions to protect beneficial uses.
10 Ultimately, however, the LA MS4 dischargers are responsible for the discharges from the MS4.
11 Those discharges are required to conform to the permit, but are subject to the underlying
12 restrictions of the Porter-Cologne Act. Namely, the discharges from the MS4 may not violate the
13 water quality objectives in the water quality control plan or contribute to a condition of nuisance.

14 The receiving water and nuisance permit language is a catchall provision ensuring that the
15 underlying restrictions of the Porter-Cologne Act remain in force. The standard is driven by
16 water quality objectives and is, therefore, not an arbitrary or unknowable standard. The limitation
17 simply reflects standards identified in the water quality control plan. Further, the limitation
18 acknowledges the exigencies of permitting. The Regional Board may authorize the discharge of
19 waste meeting certain requirements, but cannot provide blanket license for discharges of waste
20 exceeding water quality objectives or creating a nuisance, and the discharger is not out of
21 compliance so long as it timely implements the appropriate control measures.

22 2. *The LA MS4 Permit’s Receiving Water Language Affords the Petitioners Adequate*
23 *Protection While Creating Clear Requirements for Addressing Receiving Water*
24 *Violations.*

25 The LA MS4 permit addresses many of the concerns raised by the Petitioners by expressly
26 demonstrating the nexus between timely implementation of measures in the storm water quality
27 management plan (SQMP) and compliance with the receiving water limitations. First, the

28 ³⁹ Cal. Wat. Code, § 13263, subd (a).

⁴⁰ *Ibid.* and *id.*, § 13241.

1 receiving water language does not stand as an absolute. In other words, the receiving water
2 limitations in Parts 2.1 and 2.2 do not stand in isolation. Instead, coupled with the receiving
3 water language are specific requirements as to how the dischargers must comply with the
4 receiving water language.⁴¹ To this extent, the revision affords the dischargers some measure of
5 certainty that the “timely implementation of control measures and other actions to reduce the
6 pollutants in the discharges” consistent with the permit will satisfy the permit terms.⁴² In
7 addition, the revision continues to uphold the underlying requirements of the Clean Water Act
8 and the Porter-Cologne Act to implement the relevant water quality objectives and to protect
9 against nuisance.⁴³

10 The iterative process is structured to allow dischargers the flexibility to try low-cost BMPs
11 and to evaluate the effectiveness of those BMPs. Evaluating the effectiveness of the BMPs is one
12 of the objectives of the dischargers’ monitoring and reporting program. As structured,
13 dischargers have the opportunity and flexibility to propose additional and/or different BMPs than
14 those outlined in their SQMP, based upon their monitoring results. This flexibility is further
15 clarified in Part 3 of the permit, where section 4 specifies that dischargers shall customize the
16 SQMP to reflect conditions in their respective jurisdictions. And with regard to the dischargers’
17 requirement to ensure effective implementation of minimum BMPs under the
18 Industrial/Commercial Facilities Control Program, the Regional Board has allowed flexibility for
19 dischargers to substitute equivalent BMPs, defined as a BMP that will achieve the equivalent
20 reduction of pollutants vis-à-vis one of the specified minimum BMPs in local ordinances,
21 Resolution 98-08, or in the permit⁴⁴.

22 Should dischargers fail to act on the opportunity to modify BMPs, the Regional Board
23 would direct dischargers to modify their BMPs, as outlined Part 2, section 3 of the permit. The
24 burden is on the dischargers provide the Regional Board with information demonstrating that
25 their BMPs meet the relevant standards. Further, Part 2.4, states in part:

26 ⁴¹ Order 01-182, Part 2.3.

27 ⁴² *Ibid.*

28 ⁴³ The State Board has recognized as much in State Board Orders WQ 99-05, WQ 2001-15, by modifying MS4 permits to include the receiving water language.

⁴⁴ Part 4, section C.2.a.

1 So long as the Permittee has complied with the [iterative] procedures set
2 forth above and is implementing the revised SQMP and its components, the
3 Permittee does not have to repeat the same procedure for continuing or
4 recurring exceedances of the same receiving water limitations unless
5 directed by the Regional Board to develop additional BMPs.

6 This provision, which originated in the State Board's prior precedents, recognizes that
7 non-compliance with receiving water limitations is an expected condition. The point of the
8 iterative process is to make progress toward achievement of water quality limitations while
9 acknowledging that they will not be easily achieved and that a prolonged period of time will be
10 needed to identify new BMPs, apply them in the field, and then to measure their success. This
11 language is adequate to provide sufficient protection against the threat of third party litigation,
12 while also preserving Regional Board enforcement discretion when a discharger fails to take
13 appropriate activities.

14 *3. The State Board Could Provide Additional Guidance as to What Constitutes a
15 Violation of the Iterative Process.*

16 As is clear from the above, the Regional Board considers the only logical construction of
17 the receiving water language to be that compliance is achieved through an iterative process.⁴⁵
18 One concern raised by this approach is that the iterative process is subject to abuse. Piecemeal
19 efforts to address continuing receiving water violations could arguably be used to forestall
20 enforcement actions, all the while the MS4 could contribute to significant impairments. The
21 Regional Board believes that the receiving water limitation language's requirements to develop
22 and to implement additional BMPs tailored to address the continuing exceedances requires that
23 these efforts be in good faith. In other words, if a discharger proposes a wholly minimal and
24 ineffective BMP, the discharger will not have complied with the requirement to develop BMPs
25 designed "assure compliance with" receiving water limitations, and will not have developed
26 "additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or
27 contributing to the exceedances of water quality standards."⁴⁶ Most importantly, a violation will
28 arise if the discharger fails to carry out any of the BMPs or other revisions approved by the

⁴⁵ Obviously, the receiving water language does not shield individual permittees from acts or omissions, including the failure to carry out BMPs or other provisions of the SQMP, that may contribute to violations of water quality standards.

⁴⁶ Order No. 01-182, Part 2.3.

1 Regional Board.⁴⁷

2 The Regional Board believes that additional guidance on the implementation of the
3 receiving water language may prove helpful to regional boards and dischargers; however, the
4 Regional Board does not believe that any revisions to the existing LA MS4 permit's receiving
5 water language is necessary. The existing language provides suitable flexibility to the dischargers
6 in addressing receiving water violations and suitable flexibility to the Regional Board in
7 addressing gross violations of receiving water standards when wholly inadequate responses are
8 developed by the dischargers.

9 ***B. THE STORM WATER QUALITY MANAGEMENT PROGRAM IS BEST***
10 ***ENFORCED THROUGH EFFLUENT LIMITATIONS, IN THE FORM OF BMPs***
11 ***AND OTHER ACTIONS, INCORPORATED DIRECTLY IN THE PERMIT.***

12 The Regional Board properly concluded that the evolving MEP standard requires
13 increasing specificity to ensure both that the discharge of pollutants from the MS4 is reduced to
14 the MEP and that the Regional Board can meaningfully enforce the Clean Water Act and the
15 Porter-Cologne Act. As previously mentioned, the LA MS4 permit is a third generation permit.
16 The first MS4 permit issued in 1990 essentially incorporated Part 1 and Part 2 application
17 requirements proposed by the EPA in 1988. LA MS4 dischargers were required to inventory
18 existing BMPs, propose additional BMPs to reduce pollutants in storm water discharges, and
19 conduct monitoring. The second MS4 Permit issued in 1996 was structured to establish a basic
20 set of MS4 program elements countywide through the development of model programs, which
21 were to be implemented no later than July 1, 1999. These programs became an integral part of
22 the Los Angeles County Storm Water Quality Management Program and were submitted as part
23 of the ROWD in February of 2001 for the third permit term.

24 The Regional Board utilized the information in the ROWD to craft the LA MS4 permit
25 currently under petition. It is eminently reasonable for the Regional Board to incorporate in the
26 permit detailed and "prescriptive" BMPs contained in the ROWD and prior permit programs, and
27 exercise its best professional judgment in selecting the best suite of BMPs to be listed in the
28 permit as effluent limitations to meet both MEP and water quality standards. In fact this approach

⁴⁷ *Ibid.*

1 is exactly what the EPA espouses as a means for storm water discharges to meet water quality
2 standards.

3 The interim permitting approach uses BMPs in first-round storm water
4 permits, and *expanded or better-tailored BMPs in subsequent permits*,
5 where necessary, to provide for the attainment of water quality standards.
6 In cases where adequate information exists to develop more specific
7 conditions or limitations to meet water quality standards, *these conditions*
8 *or limitations are to be incorporated into storm water permits*, as necessary
9 and appropriate.⁴⁸

10 The Regional Board had sufficient reason based on the results of the Los Angeles County
11 Monitoring Program conducted over several years to require specific and additional BMPs to
12 eliminate proven receiving water impacts.⁴⁹

13 The Regional Board's approach is similar to what the EPA is being required to do. For
14 example, the EPA Environmental Appeals Board (EAB) recently ruled in a first generation MS4
15 permit for the District of Columbia MS4 that specific BMPs are appropriate for MS4 permits
16 rather than numerical effluent limits.⁵⁰ The EAB's ruling mirrors the holding of the State Board
17 on the appropriate kinds of limitations to be included in MS4 Permits (Order No. 91-03 and No.
18 91-04). Further, EPA storm water regulations have been amended to authorize the use of BMPs
19 not only when, numeric effluent limits are infeasible, as was previously authorized, but also when
20 BMPs for the control of storm water discharges are authorized under Clean Water Act section
21 402(p).⁵¹

22 The Regional Board is not authorized to issue an MS4 permit that does not include
23 adequate effluent limitations to ensure both MEP and water quality standards will be met. In the
24 *Government of the District of Columbia* decision, the EAB said,

25 Long-standing [EPA] Agency regulations prohibit the issuance of a permit
26 "when imposition of conditions cannot *ensure* compliance with applicable
27 water quality requirements of all affected states." [Citation omitted.] In
28 addition, section 122.44(d) provides that the permit must contain effluent
limits as necessary to protect water quality standards. . . .⁵²

26 ⁴⁸ 65 Fed. Reg. 31703 (May 18, 2000) [Emphasis added].

27 ⁴⁹ *Supra*. See Footnotes 4, 5, 6, and 7.

28 ⁵⁰ See *In Re: Govt. of the District of Columbia MS4*, NPDES Appeal No. 00-14 & 01-09, slip op. at 16 (EAB, Feb. 20, 2002) [hereafter, EAB DC MS4 Decision].

⁵¹ See 40 C.F.R. 122.44(k).

⁵² EAB DC MS4 Decision at 9 and 16.

1 The essence of the MS4 program is for Permittees to use or require BMPs to reduce the
2 discharge of storm water pollutants from the MS4 to the MEP.⁵³ It should, therefore, not be
3 surprising that as time passes and as water quality improvements have not been realized, the MS4
4 permit should incorporate new provisions that reflect the determination of the Regional Board
5 that specific new BMPs should be implemented which are determined to meet the MEP standard.
6 This, after all, is the essence of the “iterative” process that the State Board has required in its
7 precedential decisions on the matter. In order to carry out the requirements of the Clean Water
8 Act, these BMPs and program elements (i.e., effluent limitations) must be identified in the MS4
9 permit. Without this specificity, the public cannot assess what is required by the dischargers (and
10 therefore cannot evaluate whether the program is tailored to reduce pollutants in storm water
11 discharges to the MEP) and the Regional Board has no meaningful requirements to enforce.

12 Nevertheless, the new LA MS4 permit also includes a provision for BMP flexibility.
13 Permit Part 4.A allows BMPs to be substituted upon petition by any permittee and with approval
14 of the Regional Board Executive Officer. The provision establishes a test for BMP substitution.
15 The permittee must document: (1) that the alternative will meet or exceed the objective of the
16 original requirement and can be implemented within a similar time, or (2) that the fiscal burden of
17 the original requirement is substantially greater than the proposed alternative, does not achieve a
18 substantially greater improvement in water quality than the alternative, and that the alternative
19 can be implemented within a similar time.

20 The BMP substitution provision provides the Petitioners with the opportunity to propose
21 alternative BMP approaches to those specified in the permit. Rather than rejecting specified
22 BMPs out of hand in this petition and citing their unreasonableness and cost, the petitioners can
23 take the opportunity to justify, with specificity and adequate justification, alternatives that can
24 achieve the same result. All such BMPs and program elements are designed to serve as effluent
25 limitations to reflect MEP and the receiving water limitations.

26 Furthermore, even if State law prohibits the prescription of BMP controls to achieve
27 compliance with State water quality standards, the State Board has previously ruled that this bar

28 _____
⁵³ EAB DC MS4 Decision at 18-19.

1 does not apply to permits, like the LA MS4 permit, that are issued under the Federal NPDES
2 program. The State Board in a precedential decision held that:

3 We do not agree that Water Code Section 13360 precludes the State or
4 Regional Boards from specifying the manner of compliance with waste
5 discharge requirements in NPDES permits. The Porter-Cologne Water
6 Quality Control Act, Division 7 of the Water Code, provides that,
7 *notwithstanding any other provision of the division*, the State and Regional
8 Boards shall issue NPDES permits as required or authorized by the Clean
9 Water Act, 33 U.S.C. §§ 1251 *et seq.*, to ensure compliance with the
10 Federal Act. Water Code § 13377.⁵⁴

11 The State Board further explained,

12 Under the Clean Water Act, effluent limitations, effluent standards and
13 prohibitions, and standards of performance promulgated by EPA are
14 enforced through the issuance of NPDES permits. Prior to the adoption of
15 such limitations, standards, and prohibitions, the Administrator of EPA is
16 authorized by the Act to impose “such conditions as the Administrator
17 determines are necessary” to carry out the provisions of the Act. 33 U.S.C.
18 § 1342(a)(1); *see NRDC, Inc. v. Costle*, 568 F.2d 1369 (DC Cir. 1977). In
19 addition, EPA regulations adopted under the Clean Water Act authorize
20 conditions in NPDES permits setting “best management practices” where
21 numeric effluent limitations are infeasible or where reasonably necessary to
22 achieve effluent limitations and standards or to carry out the purposes and
23 intent of the Act

24 * * *

25 To the extent that this authorization is inconsistent with the provisions of
26 water code section 13360, the authority of the State and Regional Boards to
27 implement the provisions of the Clean Water Act under Water Code
28 Section 13377 must prevail. *See* Water Code Section 13372.⁵⁵

29 Clearly, the Clean Water Act authorizes the imposition of conditions including BMPs⁵⁶
30 and that the Porter-Cologne Act gives the State and Regional Boards the same authority.⁵⁷ In
31 fact the explicit language of the Clean Water Act sanctions the Regional Board to impose BMP
32 limitations in MS4 permits and determine the manner of compliance. The Clean Water Act states
33 that MS4 permits:

34 shall require controls to reduce the discharge of pollutants to the maximum
35 extent practicable, *including management practices, control techniques and*

36 ⁵⁴ State Board Order No. WQ 80-19 at pp. 19-20 [italic emphasis supplied, underline emphasis added].

37 ⁵⁵ State Board Order No. WQ 80-19 at pp. 20-21.

38 ⁵⁶ 33 U.S.C. § 1342(p)(3)(B)(iii) and 40 C.F.R. § 122.44(k)(2).

⁵⁷ See Cal. Wat. Code § 13372. Where other provisions of the Porter-Cologne Act are inconsistent with Chapter 5.5,
the provisions of Chapter 5.5 prevail to the extent of any inconsistency.

1 *system, design and engineering methods, and such other provisions as*
2 *the . . . State determines appropriate for the control of such pollutants.*⁵⁸

3 The Regional Board decision to specify provisions required to be carried out by the MS4
4 dischargers, including the provisions for the placement of trash receptacles, are lawful and
5 appropriate. Specificity in the program elements is necessary to reflect the evolving nature of the
6 MS4 permits and to detail requirements in the absence of numeric effluent limitations. The detail
7 represents good public policy because the dischargers, the public, and the Regional Board all
8 recognize the requirements the dischargers must complete. Further, to the extent the dischargers
9 identify comparable or superior BMPs, the LA MS4 permit contains the required flexibility to
10 substitute BMPs.

11 ***C. THE PERMIT ESTABLISHED A LAWFUL MECHANISM FOR INCORPORATING***
12 ***TRASH TMDL IMPLEMENTATION PROVISIONS***

13 The Regional Board included a lawful, yet novel, approach for addressing total maximum
14 daily loads (TMDLs) in the MS4 permit. When the Regional Board first received the ROWD
15 from the MS4 discharger, it was in the process of adopting trash TMDL for the Los Angeles
16 River and Ballona Creek watersheds (collectively, Trash TMDLs).⁵⁹ Prior to the adoption of the
17 MS4 permit, the Regional Board had already adopted the Trash TMDLs and submitted them to
18 the State Board.⁶⁰ Through these Trash TMDLs, the Regional Board had established a 14-year
19 implementation schedule to achieve a numeric target of zero trash in the subject watersheds. The
20 Trash TMDL also included detailed implementation provisions. Further, the Trash TMDLs
21 assigned a waste load allocation to the MS4 with a phased schedule and three-year rolling
22 averages for determining compliance with the waste load allocations.

23 The LA MS4 permit lawfully includes flexibility to incorporate implementation elements
24 of the Trash TMDLs into the SQMP. While the Regional Board may not delegate the
25 modification of waste discharge requirements to the Executive Officer,⁶¹ there has been no
26 impermissible delegation here. First, the Executive Officer has no authority to revise the waste

27 ⁵⁸ 33 U.S.C. § 1342(p)(3)(B)(iii) [emphasis added].

28 ⁵⁹ See Regional Board Resolution No. 01-006 (Jan. 25, 2001).

⁶⁰ See Regional Board Resolution Nos. 01-013 and 01-014 (Sep. 19, 2001).

⁶¹ Water Code, § 13223, subd. (a).

1 discharge requirements themselves. Instead, the provisions of the LA MS4 permit merely require
2 the dischargers to revise their SQMP to incorporate program elements lawfully adopted by the
3 Regional Board.⁶² This SQMP revision process is similar to the regular revisions to the SQMP
4 already required under various program elements (e.g., the receiving water limitation language).
5 Although the SQMP is an enforceable element of the permit, it is not a waste discharge
6 requirement established by the Regional Board.

7 Second, the Trash TMDL implementation requirements had already been adopted by the
8 Regional Board. To this extent, any SQMP revision the Executive Officer directs simply reflects
9 a lawful exercise of authority in which the Executive Officer has no discretion. For example,
10 Regional Board orders are issued under the signature of the Executive Officer, although the
11 Regional Board adopts the waste discharge requirements. This is a function the Executive Officer
12 carries out at the direction of the Regional Board, although arguably it's a delegation of
13 authorities. The incorporation of explicit TMDL implementation provisions that a Regional
14 Board has already adopted do not reflect an impermissible delegation to the Executive Officer
15 because the Regional Board has explicitly instructed the Executive Officer as to the amendments.
16 While this may not be true of all TMDLs, it is a lawful delegation in the context of the Trash
17 TMDLs because all waste load allocations and reductions were assigned to the MS4. There is no
18 additional interpretation and discretion by the Executive Officer.

19 Similarly, the Regional Board made its intent clear in the two-track system it devised for
20 catch basins.⁶³ With respect to catch basins, the Regional Board specified interim requirements
21 until the "trash TMDL implementation measures are adopted."⁶⁴ After there is an effective
22 implementation schedule (which the Regional Board has construed as requiring Office of
23 Administrative Law approval), the dischargers "shall implement programs in conformance with
24 the TMDL implementation schedule."⁶⁵ The Regional Board's intent is manifest, and there is no
25 impermissible delegation to the Executive Officer.

26
27 ⁶² Order No. 01-182, Part 3.C.

28 ⁶³ Order No. 01-182, Part 4.F.5.b.

⁶⁴ Order No. 01-182, Part 4.F.5.b.

⁶⁵ Order No. 01-182, Part 4.F.5.b.

1 The Regional Board's language reflects the exigencies of the LA MS4 permit and the
2 Trash TMDLs. The Regional Board had already adopted the Trash TMDLs prior to consideration
3 of the LA MS4 permit. In addition, the Trash TMDLs provided very specific implementation
4 provisions for the MS4. Rather than requiring a revision of the waste discharge requirements, the
5 Regional Board prospectively authorized the Trash TMDLs to be incorporated into the SQMP
6 once the Trash TMDLs had received the subsequent approvals of other state agencies. All the
7 permittees had ample opportunity to participate in, and had notice of, the Trash TMDL
8 requirements. Further, at the time the LA MS4 permit was adopted, the dischargers were already
9 on notice of the requirements with which they would need to comply.

10 The approach developed by the Regional Board, while novel, was appropriate and
11 represents an efficient use of limited resources. At the same time, the Regional Board recognizes
12 that if numeric effluent limitations were established to be consistent with the assumptions of a
13 TMDL's waste load allocation or some other provision required the Executive Officer's exercise
14 of discretion in establishing waste discharge requirements, then the prospective delegation may
15 run afoul of Water Code section 13223(a). However, the Regional Board's actions were not an
16 impermissible delegation.

17 ***D. PERMITTEES ARE REQUIRED UNDER FEDERAL REGULATIONS TO INSPECT***
18 ***AND ENFORCE THEIR STORM WATER CONTROLS AT INDUSTRIAL/***
19 ***COMMERCIAL FACILITIES***

20 There is strong evidence indicating that pollutants in storm water runoff from industrial
21 and commercial facilities contribute to impairment of beneficial uses. As educational outreach
22 under the second-generation permit has not been adequate to effect behavioral changes on the part
23 of businesses, the Regional Board determined that an effective industrial/commercial control
24 program must include inspections by permittees. In structuring a requirement for an
25 Industrial/Commercial Facility Control Program, the Regional Board diligently and actively
26 considered the dischargers' concerns and suggestions. The resulting requirement, in Part 4.C
27 (pages 27 to 34) of the 2001 permit, which is predicated on a joint and coordinated strategy at
28 both the Regional Board and municipal levels, specifies that Permittees undertake three tasks, to:

- 1 1. track critical sources of pollutants exposed to storm water from
2 industrial/commercial activities,
- 3 2. inspect facilities in specified sectors that have been deemed critical
4 sources, and
- 5 3. ensure compliance of facilities in critical sources.

6 The LA MS4 permit *does not* specify that permittees must assume responsibility for
7 enforcing the State’s General Permit No. CAS000001 – Waste Discharge Requirements (WDRs)
8 for Discharges of Storm Water Associated with Industrial Activities Excluding Construction
9 Activities (General Permit). Rather, it limits the MS4 dischargers’ obligation to that of support in
10 the Regional Board’s oversight efforts of heavy industrial facilities, and specifies that permittees
11 need only assist the Regional Board in (a) identifying non-filers, and (b) confirming that operators
12 enrolled in the State’s General Permit have a storm water pollution prevention plan (SWPPP).
13 The 2001 permit does not require a permittee to evaluate any SWPPP required under the State’s
14 General Permit—a permittee must merely confirm that a SWPPP is present.

15 Finally, the Regional Board determined that the requirement for an Industrial/Commercial
16 Facilities Control Program, as structured, is consistent with the Clean Water Act and authorized
17 by law.

18 *1. There Is Strong Evidence Indicating That Pollutants In Storm Water Runoff From
19 Industrial And Commercial Facilities Contribute To Impairment Of Beneficial Uses.*

20 The County of Los Angeles is one of the most industrialized areas in the nation. The
21 County has the greatest number of impairments in the State, as indicated by the 303(d) list, and
22 industrial and commercial activities are a significant source of the pollutants that impair these
23 surface waters. Numerous other studies, as documented in the findings of the 2001 permit,
24 substantiate storm water as a significant source of these impairments. Among these studies is the
25 permittees’ own critical source monitoring,⁶⁶ led by the County of Los Angeles as required in the

26 ⁶⁶ Critical Source Selection and Monitoring Report, County of Los Angeles Department of Public Works (September
27 3, 1996), in which the Principal Permittee identified high risk activities that pollute storm water in the County. Five
28 of these activities – scrap metals, trucking, chemical, primary metal, metal fabricating – are partly regulated by the
State’s General Industrial Activities Storm Water Permit for Industrial Activities. The other activity – automotive
services – is not subject to the State’s General Industrial Activities Storm Water Permit or to USEPA Phase 1
regulations. Also, through industrial waste inspections conducted during the first permit term for sanitation
departments, several Permittees identified two additional activities – retail gas outlets (RGOs) and restaurants – as
activities that pose a high risk for storm water pollution.

1 1996 permit. The County's critical source monitoring underscores the need to better control
2 industrial and commercial activities that are critical sources of storm water pollution.

3 2. *The Regional Board Lawfully Adopted a Cooperative Regional Board-Municipal*
4 *Permittee Inspection Program to Change Behavior on the Part of High Priority,*
5 *Industrial/Commercial Dischargers to the MS4.*

6 If the Regional Board is to make significant progress toward cleaning up impaired waters
7 in the County, inspections and compliance assurance oversight of conventional and toxic
8 pollutants from industrial and commercial activities exposed to storm water are needed to effect
9 behavioral change. By way of background, during the first term of the permit (1990 to 1996), the
10 Regional Board specified that municipalities implement thirteen BMPs, among which included
11 storm water education. In 1995, initial drafts of the 1996 permit specified that municipalities
12 shall inspect industrial and commercial facilities. However, the Regional Board scaled back this
13 requirement by the time it renewed the permit for the second term (1996 to 2001), in part due to
14 insistence by many of the permittees that additional time was needed for an educational approach
15 to effect behavioral changes.

16 Despite over 11 years of educational efforts, industrial and commercial facilities that are
17 significant sources of pollutants in storm water have not improved practices with regard to
18 eliminating nonstorm water discharges and minimizing exposure of pollutants in contact with
19 storm water. Accordingly, for the third term of the permit (2001 to 2006), the Regional Board
20 tried to work with permittees to structure a viable, practical, and coordinated approach to fairly
21 share responsibility for a control program for industrial and commercial activities. This approach,
22 as it was fleshed out among the Regional Board, permittees, and other interested parties in
23 numerous drafts and ultimately adopted on December 13, 2001, recognized:

- 24 1. the State's responsibility and existing program⁶⁷ to lead efforts for
25 heavy industrial facilities (i.e. Phase 1 facilities), and
- 26 2. the efficacy of municipalities to lead oversight efforts for certain
27 specified commercial sectors, including:

28 ⁶⁷ i.e. The State's General Permit No. CAS000001 – Waste Discharge Requirements (WDRs) for Discharges of
Storm Water Associated with Industrial Activities Excluding Construction Activities.

- automotive service facilities,
- restaurants, and
- retail gasoline outlets and automotive dealerships.

3. *The Regional Board Diligently And Actively Considered The Permittees' Concerns And Suggestions In Structuring The Requirement For An Industrial/Commercial Control Program.*

In the first draft (April 13, 2001) of the 2001 permit,⁶⁸ the Regional Board took a “top-down” approach to inspections, proposing that Permittees screen and inspect tens of thousands of industrial and commercial facilities for compliance with state and local regulations. Many permittees objected to the proposed inspection requirement in the first draft. Among the many objections were concerns over the number of inspections, scope of inspections, associated costs, and confusion over the role of the State’s effort to oversee storm water compliance at heavy industrial facilities (Phase 1) vis-à-vis the Permittees’ proposed responsibilities. Accordingly, in the second draft (June 29,2001),⁶⁹ the Regional Board attempted to better structure a partnership between the Regional Board and Permittees. The proposed structure in the second draft clarified that the Regional Board is leading efforts to regulate “Phase 1” industrial facilities under the General Permit, and that Permittees would focus and lead efforts to regulate other problem sectors, such as automotive service facilities, restaurants, and retail gasoline outlets.

In response to permittees’ comments regarding the inspection requirement as proposed in the second draft, the staff provided three options for the Regional Board to consider, in a third draft (October 11, 2001).⁷⁰ These options ranged from: (a) inspections of facilities mandated by the USEPA (i.e. landfills, Resource Conservation and Recovery facilities, and toxics treatment storage disposal facilities “TSDF”), facilities in the automotive sector, restaurants, and retail gasoline outlets; (b) inspections of all facilities in Option (a) plus five other sectors, including scrap recycling, automotive dismantling, metal fabrication, motor freight, chemical manufacturing, and primary metal products; and (c) continuance of an educational site visit program, similar to the requirement in the 1996 permit. In the Regional Board staff’s opinion,

⁶⁸ AR, Vol. 3, Item 37.

⁶⁹ AR, Vol. 5, Item 150.

⁷⁰ AR, Vol. 8, Item 239.

1 Option (b) was preferred, as Option (a) failed to address all critical sources of pollutants, and
2 Option (c) merely retained the status quo effort which staff do not believe will adequately address
3 the need to improve business practice.

4 Prior to the Regional Board's consideration of the proposed permit, certain Permittees and
5 public officials requested a delay in order for a facilitation effort led by the EPA. Accordingly,
6 the Regional Board delayed consideration of the permit, and participated in two day-long
7 sessions, on November 9th and 29th. These sessions among permittees, Regional Board staff, and
8 environmental representatives focused on inspection requirements. The Regional Board staff
9 attempted to understand and consider the various positions and limitations of the Permittees and,
10 as a result, prepared another option for the Regional Board to consider – namely a hybridized
11 Option A/C, which blended elements of the other options previously submitted to the Regional
12 Board and to the public.⁷¹

13 *4. The 2001 Permit Does Not Include A Requirement For Permittees To Assume*
14 *Enforcement Responsibilities For Facilities Enrolled In The State's General Permit.*

15 The Regional Board has clarified, numerous times and in numerous settings, that the
16 permittees are not being required to enforce the State Board's General Permit. As explained
17 above, the Regional Board has recognized its responsibilities under the General Permit, and
18 required two clearly and explicitly defined obligations for Permittees to undertake in support of
19 the State's General Permit, as detailed below:

- 20 • assist the Regional Board in identifying any Phase 1 facilities that
21 are not enrolled under the State's General Permit (i.e. non-filers);
and
- 22 • assist the Regional Board in confirming that enrollees under the
23 General Permit have a SWPPP. There is not requirement for the
24 permittees to review the SWPPP.

25 In the event that a permittee identifies a non-filer and/or an enrollee under the General
26 Permit without a SWPPP, the LA MS4 permit provides for the permittee to refer such a violation
27 to the Regional Board, following one inspection and one written notice of the violation.⁷²

28 ⁷¹ As most of these changes were made in response to Permittees' concerns about costs and their limited resources,
these changes are summarized below in the Section E of this response on costs.

⁷² Order No. 01-182, Part 4, section C.3.d.2.

1 5. *The LA MS4 Permit's Requirement For Permittees To Track, Inspect, And Enforce*
2 *Storm Water Best Management Practices And Ordinances Is Consistent With The*
3 *Clean Water Act And Authorized By Law.*

4 Federal regulations clearly acknowledge the significance of pollutants from heavy
5 industry, and mandate that municipal permittees have source control programs for facilities in
6 specified industrial sectors. The Clean Water Act and implementing MS4 regulations afford the
7 Regional Board adequate legal authority to establish a permit condition, in the Regional Board's
8 judgment, that requires inspections of facilities contributing pollutants to the MS4. The Clean
9 Water Act vests the Regional Board with substantial authority in developing MS4 permit
10 requirements. Section 402(p)(3)(B) states that permits for MS4 discharges:

- 11 (i) may be issued on a system- or jurisdiction-wide basis;
- 12 (ii) shall include a requirement to effectively prohibit non-stormwater
13 discharges into the storm sewers; and
- 14 (iii) shall require controls to reduce the discharge of pollutants to the
15 maximum extent practicable, including management practices, control
16 techniques and system, design and engineering methods, and such other
17 provisions as the Administrator or the State determines appropriate for the
18 control of such pollutants.⁷³

19 Congress created the "maximum extent practicable" (MEP) standard and the requirement to
20 "effectively prohibit non-stormwater discharges" into the MS4 in an effort to allow permit writers
21 the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges.⁷⁴ The
22 flexibility includes the ability direct permit requirements at the sources of pollution, and not
23 simply the MS4 discharge points.⁷⁵

24 In developing regulations to implement the MS4 requirements, the EPA identified specific
25 program elements that a municipal discharger had to identify as part of the MS4 permit
26 application.⁷⁶ Again, these were application requirements that in many instances identified the
27 minimal authority that the municipal discharger must demonstrate as part of an application.⁷⁷

28 ⁷³ 33 U.S.C. § 1342(p)(3)(B)(i)-(iii).

⁷⁴ 132 Cong.Rec. S16,424 (Oct. 16, 1986), *reprinted in* 2 Environment and Natural Resources Policy Division,
Library of Congress, *A Legislative History of the Water Quality Act of 1987* 646 (1988); House Committee on Public
Works and Transportation, Section-by-Section Analysis (100th Sess. 1987), *reprinted in* 1987 U.S.C.C.A.N. (101
Stat. 7) 5, 38-39; see also 55 Fed. Reg. 47990, 48,038 (Nov. 16, 1990).

⁷⁵ 55 Fed. Reg. at 48,038 (Nov. 16, 1990).

⁷⁶ 40 C.F.R. § 122.26(d).

⁷⁷ See, e.g., 40 C.F.R. § 122.26(d)(2)(iv).

1 Nothing in the regulations erodes the Regional Board’s authority to establish provisions it deems
2 “appropriate for the control of [] pollutants” in the MS4.⁷⁸ In fact, the EPA contended during the
3 rulemaking that:

4 Proposed management programs will then be evaluated in the development of
5 permit conditions. * * * EPA anticipates that storm water management programs
6 will evolve and mature over time. The permits for discharges from municipal
7 separate storm sewer systems will be written to reflect changing conditions that
8 result from program development and implementation and corresponding
9 improvements in water quality.⁷⁹

10 As part of the MS4 application, the Permittee needs to develop a proposed management
11 program that encompasses commercial and residential areas, illicit discharges, and discharges of
12 storm water associated with industrial activities.⁸⁰ For commercial and residential areas, the
13 application must describe “structural and source control measures to reduce pollutants.”⁸¹ In
14 contrast, for illicit discharges and discharges associated with industrial activities, the program
15 description must include a program of inspections.⁸²

16 As part of work under its existing permit, the Permittees identified certain commercial
17 facilities that contributed substantial pollutants to the MS4. In particular, Retail Gasoline Outlets
18 (RGOs) and restaurants contribute significant pollutants. At restaurants, pretreatment records
19 indicated that grease traps often backed up from the sanitary sewer system into the MS4. In
20 addition, there was a prevalence of illicit discharges into the MS4 from improper washdown
21 operations. At RGOs, the significant volumes of pollutants had the ability to introduce pollutants
22 via non-storm water discharges to the MS4. The dischargers and the Regional Board have
23 evaluated this evidence, and Regional Board determined that more in-depth inspection is
24 appropriate at these commercial facilities.

25 For Permittees to comply with the MEP and effective prohibition standards in Clean
26 Water Act section 402(p)(3), they must do more than plan for pollution control. Nor can they hide

27 ⁷⁸ 33 U.S.C. § 1342(p)(3)(B)(iii); see also *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167
28 (discussing permitting authorities’ authority to establish appropriate requirements in storm water permitting
approach).

⁷⁹ 55 Fed. Reg. 47990, 48052 (Nov. 16, 1990).

⁸⁰ 40 C.F.R. § 122.26(d)(2)(iv).

⁸¹ 40 C.F.R. § 122.26(d)(2)(iv)(A).

⁸² 40 C.F.R. § 122.26(d)(2)(iv)(B),(C).

1 behind a claim that they lack the authority to conduct inspections. The Permittees must make “a
2 strong effort to have the necessary police powers and controls based on pollutant data.”⁸³ Should
3 existing authority be deficient to meet permit requirements, Permittees must amend their local
4 ordinances in order to be able to meet permit requirements including carrying out inspections.⁸⁴

5 The LA MS4 permit’s requirement for inspections is appropriate within the meaning of
6 section 402(p)(3)(B). First, the dischargers have identified the subject facilities as significant
7 contributors to the MS4 system. To have any meaning, the reduction of pollutants to the MEP
8 must include responding to pollutant concerns identified as part of the permit program. The
9 current permit regime appears to be inadequate, so additional enforcement (through inspections to
10 identify problems) is an appropriate response. Second, the pollutants are reaching the MS4
11 apparently as the result of illicit discharges and/or illicit connections to the MS4 and the
12 inadequate implementation of storm water controls. To this extent, the EPA’s Part 2 MS4
13 application regulation explicitly requires the discharger to identify inspection authority.
14 Following through with an actual inspection program is necessary to effect the regulatory
15 provisions and reduce pollutants to the maximum extent practicable.

16 The inspection requirement is a reasonable and appropriate application of the Regional
17 Board’s permitting authority. Moreover, it is important to underscore that the MS4 permittees are
18 not required to enforce the General Permit directly. Instead, they are responsible for ensuring that
19 the industrial facility is “effectively implementing BMPs in compliance with County and
20 municipal ordinances, Regional Board Resolution 98-08, and the SQMP.”⁸⁵ For purposes of
21 integrating with Regional Board inspections, the MS4 permittees are merely required to identify
22 the industrial facilities waste discharger identification number and the fact that it actually has a
23 copy of a SWPPP onsite. These requirements do not supplant the Regional Board’s enforcement
24 responsibilities, and are wholly consistent with the Clean Water Act.

25 ***E. DURING PERMIT DEVELOPMENT, THE REGIONAL BOARD CONSIDERED***

26 _____
27 ⁸³ 55 Fed. Reg. 48044 (Nov. 16, 1990).

28 ⁸⁴ See *In Re: City of Irving, Tex. Mun. Separate Storm Sewer System*, NPDES Appeal No. 00-18, slip op. at p. 14 (EAB, July 16, 2001) discussion on what constitutes compliance with MEP and “effective prohibition” standards in the CWA.

⁸⁵ Order 01-182, Part C.2.b.

1 ***ECONOMIC COSTS CONSISTENT WITH THE MEP STANDARD***

2 *1. The Regional Board Diligently Considered Permittees' Comments And Concerns*
3 *About Costs And, As A Result, Made Numerous Modifications To The LA MS4 Permit.*

4 In structuring the third-generation permit, the issue most frequently discussed with
5 permittees was the cost of the requirements. The Regional Board responded by drafting three
6 different versions of the permit, as well as interim drafts for certain sections of the permit which
7 were used for discussion purposes. In each case, the Regional Board attempted to effect the State
8 Board's prior, precedential decisions concerning MEP and costs.

9 Specifically, the Regional Board recognized that technical feasibility and cost are both
10 relevant in determining what constitutes MEP.⁸⁶

11 [I]f a permittee employs all applicable BMPs except those where it can
12 show that they are not technically feasible in the locality, or whose cost
13 would exceed any benefit to be derived, it would have met the [MEP]
14 standard. MEP requires permittees to choose effective BMPs, and to reject
15 applicable BMPs only where other effective BMPs will serve the same
16 purpose, the BMPs would not be technically feasible, or the cost would be
17 prohibitive. Thus while cost is a factor, the Regional Water Board is not
18 required to perform a cost-benefit analysis.⁸⁷

19 The State Board's precedential decision recognizes that permittees have an important role in
20 defining the contours of MEP within their jurisdiction. In developing the third-generation permit,
21 the Regional Board listened to the comments of dischargers, and where appropriate
22 documentation and rationale could be provided, made appropriate adjustments to the LA MS4
23 that reflect the MEP standard. Below are examples, which are not exhaustive, of areas where the
24 Regional Board scaled back permit specifications, performance measures, and monitoring
25 requirements in favor of permittees, due to their concerns over costs.

26 **Public Information and Participation Program:** With regard to a Business Assistance
27 Program, the Regional Board eliminated this as a requirement in the draft that was adopted.⁸⁸ In
28 the first draft, the Regional Board proposed that each permittee develop and implement a

26 ⁸⁶ State Board Order No. WQ 2000-11 at p. 20.

27 ⁸⁷ State Board Order No. WQ 2000-11 at p. 20.

28 ⁸⁸ The 2001 permit merely suggests that "Permittees may implement a Business Assistance Program..." (page 27, Part 4, section B.2.b).

1 Business Assistance Program, to “provide confidential, technical resource assistance to small
2 businesses to help them understand and comply with storm water regulations.”⁸⁹ Under this
3 program, permittees were to provide assistance to small businesses that lack funding for private
4 consulting and the expertise necessary to understand and comply with storm water regulations.
5 The Regional Board’s first draft proposal included detailed specifications for the program, among
6 which included on-site technical assistance and access to information for environmental
7 consulting, hazardous waste treatment, etc. Permittees’ concerns over this requirement included
8 liability as well as the cost of implementation; and they proposed that assistance to small business
9 could be achieved through other means. Accordingly, the Regional Board eliminated this
10 requirement before adoption of the final permit draft.

11 **Industrial/Commercial Facilities Control Program:** As noted in the Section D, *supra*,
12 of this response, the Regional Board initially proposed a “top-down” inspection approach in the
13 first draft.⁹⁰ The top-down approach would have required that permittees screen and inspect what
14 would have been tens of thousands of industrial and commercial facilities for compliance with
15 state and local regulations. In subsequent drafts, the Regional Board focused its requirements, to
16 better clarify a balanced approach whereby the Regional Board would lead oversight efforts for
17 Phase 1 (heavy industry) facilities, while the permittees would lead efforts for facilities in high
18 risk commercial sectors; namely automotive service facilities, restaurants, and retail gasoline
19 outlets and automotive dealerships. In addition to more narrowly focusing the scope of this
20 program for the permittees, examples of other changes made to address permittees’ concerns
21 regarding the costs of this program include:

22 *Frequency of inspections:* The first draft required permittees to conduct
23 inspections once every 24 months. The final draft decreased the frequency by 20% to
24 once every 30 months.

25 *Level of inspections:* In order to better understand the level of effort needed for
26 inspections and to define and limit the level of their inspections, the permittees asked that
27

28 ⁸⁹ AR, Vol. 3, Item 37.

⁹⁰ AR, Vol. 3, Item 37.

1 the Regional Board provide very specific detail regarding effective implementation of
2 BMPs. Accordingly, in version A/C, the Regional Board provided a list of:

- 3 • 5 minimum BMPs for restaurants,
- 4 • 8 minimum BMPs for automotive service facilities, and
- 5 • 7 minimum BMPs for retail gasoline outlets and automotive dealerships.

6 However, because permittees did not want to lose any flexibility, the Regional Board also
7 included a provision allowing for substitution of an equivalent BMP if a permittee
8 determines that a specified minimum BMP is infeasible.

9 *Enforcement Coordination:* To address concern that the Regional Board would
10 refer numerous and burdensome cases for enforcement action by the permittees, the final
11 draft includes a provision for permittees to refer cases to the Regional Board. The final
12 draft also incorporates suggestions by permittees that limit the extent of their obligations
13 to investigate storm water complaints and to support Regional Board enforcement actions.

14 **Development Planning:** The cost effectiveness of requirements under Development
15 Planning was frequently discussed and commented on in meetings and comment letters that the
16 Regional Board considered. Upon consideration, the Regional Board made many changes, a few
17 of which include:

18 *Applicability of Numerical Design Criteria, D.4.a (page 37)* – The threshold for
19 this requirement as it applies to single-family hillside residential developments was
20 increased from 10,000 square feet in the first draft, to 1 acre in the final permit.

21 *General Plan Update, Item D.12 (page 41)* – In the first draft, the Regional Board
22 specified that permittees must update general plans to include storm water considerations,
23 no later than 540 days from permit adoption date. Permittees' objections to this
24 requirement were based on the expense of doing a special update of their general plans (in
25 addition to the legal authority of the Regional Board to require an update—
26 notwithstanding that a General Plan update was required by the 1996 LA MS4 permit).
27 Upon consideration, the Regional Board modified this requirement, which in the final
28 draft does not dictate when permittees must update their general plans; rather, that

1 permittees must simply consider storm water when they choose to update land use,
2 housing, conservation, or open space elements of general plans.

3 **Development Construction Program:** In response to Permittees' concerns, the final
4 draft scaled back on many administrative requirements, such as specifying that Permittees
5 electronically track grading permits, and requiring that permittees formally review plans for sites
6 less than 1 acre and field verify implementation of BMPs in the plans. Furthermore, the final
7 draft scaled back on the performance measures, such as:

8 *Wet weather inspections* – The first draft specified one inspection per wet season
9 for sites less than one acre. Based on input from permittees, the Regional Board
10 eliminated this inspection requirement in the final draft.

11 *Local Storm Water Pollution Prevention Plan* – The first draft specified that
12 permittees must require developers to prepare such a plan for all hillside development and
13 all development discharging to an environmentally sensitive area. Based on input from
14 permittees and the BIA, the Regional Board eliminated this requirement as it pertains to
15 sites less than 1 acre in size.

16 **Public Agency Activities:** In response to permittees' concerns, the Regional Board
17 scaled back requirements, including:

18 *Sweeping Streets:* The first draft required permittees to sweep streets a minimum
19 of 4 times per month in high priority areas and 2 times per month in all other areas.
20 Subsequently, the Regional Board engaged in discussions with permittees regarding what
21 they believed were large capital costs for purchasing street sweepers and high operational
22 costs vis-à-vis expected benefits. Additionally, many of the permittees anticipated that
23 they would be subject to a trash TMDL, and did not want to commit to the first draft's
24 street sweeping strategy, when they might need to reserve funds for alternative strategies
25 to meet upcoming TMDLs. In response, in the final draft, the Regional Board granted
26 permittees flexibility in prioritizing problem areas and also drastically reduced the
27 performance measures to: 2 times per month for Priority A streets, 1 time per month for
28 Priority B streets, and 1 time per year on all other streets.

1 *Parking Facilities Management:* The first draft required permittees to inspect
2 and/or clean all publicly-owned parking lots at least 2 times per month. The final draft
3 scaled back the requirement to include only those parking lots exposed to storm water.

4 **Elimination of Illicit Connections and Illicit Discharges Program:** In initial
5 discussions, the Regional Board proposed that permittees manage and track all suspected illicit
6 connections and illicit discharges with a Geographic Information System (GIS). In response to
7 permittees’ concerns over excessive costs and their suggestions that there were simpler and
8 adequate tracking methods – e.g. a “pin” map, the Regional Board eliminated a GIS requirement.

9 Also, the Regional Board relaxed other IC/ID specifications, such as performance
10 measures for responses to illicit connections and illicit discharges. In initial discussions and
11 working group meetings, the Regional Board listened to permittees’ concerns about adding staff
12 (in particular, on weekends) to respond to new aggressive response times, and worked to identify
13 response timeframes that are reasonably prompt and did not require significant additional staffing
14 costs. These response times, as specified in the final draft, are:

- 15 • Initiate an investigation of an illicit connection - 21 days
- 16 • Terminate a confirmed illicit connection – 180 days
- 17 • Respond to a report of an illicit discharge, with activities to cleanup and abate – 72
18 hours
- 19 • Investigate and take enforcement action – No deadline; rather, as soon as
20 practicable.

21 **Monitoring and Reporting Program** The Regional Board considered the cost of the
22 monitoring program from the beginning of the renewal process. During the initial set of meetings
23 to discuss the monitoring program requirements, the Principal Permittee frequently expressed its
24 need for the program to remain within current funding levels, of \$3.5 million for the 5-year term
25 of the permit. Despite concerns on the Regional Board’s part regarding inflation and new
26 monitoring needs, the Regional Board did work with the permittees to maintain this budget cap.
27 Both Regional Board and County staff discussed cost estimates for the proposed monitoring
28 requirements at several meetings. The Regional Board made several modifications to the

1 proposed requirements to minimize costs, including but not limited to the following:

- 2 • Limited the cost of TREs (Toxicity Reduction Evaluations) to \$300,000
- 3 • Refocused constituents to be monitored, eliminating requirements for lower
- 4 priority constituents.
- 5 • Reduced the number of sampling events at mass emission stations
- 6 • Reduced the frequency of a sediment sampling requirement, from annually to once
- 7 during the permit term (i.e., once over the next 5 years).

8 *2. The Regional Board Reviewed Cost Information Submitted By Permittees.*

9 Permittees have provided annual budget estimates for implementing the 1996 permit, as
10 required under the monitoring and reporting program for that permit. The estimates aggregated
11 \$142 million and \$145 million for fiscal years 2000/01 and 2001/02 respectively. However, the
12 permittees included questionable estimates and likely errors. For example, for the fiscal year
13 2000/01, the City of Glendale reported \$5.6 million for public agency activities, the City of
14 Downey reported \$1.6 million for monitoring, and the City of Hermosa Beach reported \$2.8
15 million for elimination of illicit discharges and connections. Upon questioning by staff, none of
16 these estimates could be verified.

17 A further example of apparent problems with the permittees' cost estimates is the wide
18 range of estimates (from zero to \$4.2 million) reported for the program to eliminate illicit
19 discharges and connections in 2000/01, vis-à-vis the IC/ID activity actually reported by the
20 permittees. The expenditures do not appear to bear any rational relationship to IC/ID elimination
21 efforts.

22 With limited exceptions, permittees failed to provide additional data regarding program
23 costs. One exception was a cost estimate, dated June 18, 2001, that the City of Los Angeles
24 submitted as part of its formal comments on the first draft. The Regional Board considered these
25 comments, and made substantial reductions in certain requirements in the third draft, such as the
26 frequency of sweeping streets (see above discussion).

27 Another exception is a \$54 billion cost estimate prepared for CalTrans, dated June 1998,
28 submitted by the Los Angeles County Economic Development Corporation and several

1 permittees. Many petitioners have widely cited this estimate as an annual cost that permittees
2 will face over the next 10 years. This is misinformation, as the CalTrans estimate was not
3 prepared for requirements specific to the LA MS4 permit. The estimate lacks credibility due to a
4 key assumption, namely that permittees are being required to shift their strategy from BMPs that
5 focus on preventing pollution at sources, to a regional treatment facility strategy that calls for
6 substantial land acquisition and capital costs to: (a) capture runoff from 1.2 inches of
7 precipitation; and (b) construct 6 plants to treat all pollutants in the runoff, at a rate of 500 million
8 gallons per day. This is clearly not the strategy reflected in the LA MS4 permit, which relies
9 upon, and provides flexibility for, permittees to devise cost-effective BMPs to prevent pollutants
10 from coming into contact with storm water and to reduce pollutants that are in the storm water.

11 Finally, it is imperative to note that the principal permittee estimated costs for industrial
12 and commercial inspections, a program that was generally considered by permittees to be the
13 most cost prohibitive element of the permit. As documented in memos prepared by the County of
14 Los Angeles, dated December 5, 2001 and January 3, 2002, these inspections “would cost the
15 County and the cities an estimated \$8 million over the 5-year permit period.”⁹¹ This \$8 million
16 cost would annualize to \$1.6 million, and be spread among all 84 permittees. This represents a
17 modest 5.5% increase over permittees 2001/02 costs of \$145 million, if one is to give credit as to
18 the accuracy and validity of this estimate prepared by the permittees.

19 3. *Responsibilities to evaluate economics were properly conducted at the federal level by*
20 *the US EPA.*

21 Despite all of the above efforts by the Regional Board to consider costs in carrying out the
22 MEP standard, it should be noted that an economic analysis was not required. Rather, an
23 economic analysis is required during rule making (i.e. adoption of the storm water regulations by
24 the EPA or the adoption of water quality objectives by the Regional Board). The action by the
25 Regional Board to adopt the LA MS4 permit was not rule making, and there are no additional
26 economic requirements for the Board to meet when adopting a permit under an approved
27 regulatory program. The State Board has previously concluded:

28 _____
⁹¹ See Regional Board’s Opposition to Stay (Mar. 20, 2002), Attachment 2, Exhibits 3 and 4.

1 “It is clear that cost should be considered in determining MEP; this does
2 not mean that the Regional Water Board must demonstrate that the water
quality benefits outweigh the economic cost.”⁹²

3 ***F. PEAK FLOW CONTROLS TO PROTECT STREAM HABITAT AND PREVENT***
4 ***EROSION ARE APPROPRIATE***

5 The Clean Water Act and the Porter-Cologne Act allow the Regional Board to include
6 peak flow limitations for storm water entering natural channels. First, the State Board has already
7 sanctioned the use of peak flow controls in MS4 permits. In the State Board’s decision upholding
8 many of the year 2000 SUSMP provisions, the State Board sustained without comment a SUSMP
9 requirement that limited “post-development peak storm water runoff discharge rates” to “the
10 estimated pre-development rate for developments where the increased peak storm water discharge
11 rate will result in increased potential for downstream erosion.”⁹³ This SUSMP provision is
12 legally indistinguishable from LA MS4 permit provisions designed to limit peak flows in natural
13 channels designed to protect stream habitat and prevent erosion.

14 Further, the State Board has dismissed any contention that it is unlawful to establish peak
15 flow controls designed to minimize erosion. Erosion limitations underlie many of the SUSMP
16 provisions upheld by the State Board in 2000 for development construction.⁹⁴ Further, in the San
17 Diego MS4 Order, the State Board soundly rejected the argument that erosion cannot be the
18 subject of an MS4 permit. The State Board states “It is absurd to contend that the [San Diego
19 County MS4] permit should have ignored [the erosion] impact from urban runoff.”⁹⁵

20 Second, the Clean Water Act authorizes the states to control flows that impair beneficial
21 uses.⁹⁶ Petitioners incorrectly rely on a line of cases concerning jurisdiction for Clean Water Act
22 permitting purposes to limit the Regional Board’s requirements when jurisdiction is clear. In this

23 _____
24 ⁹² State Board Order No. 2000-11 at p. 20.

25 ⁹³ Contra State Board Order No. 2000-11.

26 ⁹⁴ State Board Order No. 2001-11 at p. 4.

27 ⁹⁵ State Board Order WQ 2001-15 at fn. 9, p. 3.

28 ⁹⁶ See *Public Utilities District No. 1 v. Washington Dep’t of Ecology*, 511 U.S. 700 (1994), where the U.S. Supreme Court held that states can establish minimum levels of flow under the Clean Water Act in order to protect the beneficial uses of receiving waters. Although a section 401 certification, the Supreme Court’s reasoning clearly stands for the proposition that states may establish conditions to protection state water quality standards. While in *PUD No. 1* the standard was protected via a certification, here the Regional Board exercised its unquestionable jurisdiction under section 402(p) of the Clean Water Act and established flow limits in natural channels to protect aquatic habitat.

1 respect, Petitioners inappropriately cite *National Wildlife Fed'n v. Gorsuch* (D.C. Cir. 1982) 693
2 F.2d 156. *Gorsuch* involved the issue of whether EPA's decision not to require an NPDES
3 permit for all dams was reasonable. The D.C. Circuit upheld EPA's determination because it
4 found that there was no addition of pollutants by the point source, and hence, no need for an
5 NPDES permit. The *Gorsuch* decision simply does not apply in the MS4 context for which an
6 NPDES permit is clearly required under the Clean Water Act.⁹⁷

7 Unlike dams, which simply confine water in its natural course and then release it, an MS4
8 collects storm water, which contains pollutants, from throughout a jurisdiction and discharges the
9 storm water from point sources into waters of the United States. Often the storm water
10 discharged from the MS4 is discharged to a location that is not the natural drainage point for
11 urban runoff. In this respect, the MS4 is distinguishable from *Gorsuch* and its progeny and is
12 more akin to the analysis adopted by the Second Circuit in *Catskill Mountains Chapter of Trout*
13 *Unlimited v. City of New York* (2d Cir. Oct. 23, 2001) 273 F.3d 481, 492-493 (finding the
14 addition of pollutants requiring an NPDES permit occurs when a tunnel conveys water and
15 sediments from one water source to another). In conjunction with the express permitting
16 requirements in the Clean Water Act, it is clear the NPDES permit is required and that there is an
17 addition of pollutants from the MS4 that requires heightened regulation.

18 The fundamental point that undermines petitioners' argument is that, while erosion may
19 not trigger an NPDES requirement in certain circumstances, once an NPDES permit is required
20 the NPDES permit provisions and California waste discharge requirements must protect
21 beneficial uses.⁹⁸ The preamble to the EPA Phase II storm water regulations states that for post-
22 development, "[the] consideration of the increased flow rate, velocity, and energy of storm water
23 discharges must be taken into consideration in order to reduce the discharge of pollutants, to meet
24 water quality standards, and to prevent the degradation of receiving streams."⁹⁹ Further, the
25 Regional Board staff has identified several studies that demonstrate the nexus between pollutant
26

27 _____
⁹⁷ See 33 U.S.C. § 1342(p).

28 ⁹⁸ 33 U.S.C. § 1342(a); Cal. Wat. Code, § 13263, subd. (a).

⁹⁹ 64 Fed. Reg. 68722, 68761 (Dec. 8, 1999).

1 discharges and increased flow from increases in impervious surface area.¹⁰⁰ The LA MS4 permit
2 has been crafted to reduce these increased flows in natural channels to protect aquatic ecosystems
3 and other beneficial uses within the receiving waters. Peak flow limitations are an appropriate
4 and lawful requirement of the MS4 permit.

5 ***G. THE REGIONAL BOARD PROPERLY INCLUDED PROVISIONS REQUIRING***
6 ***PERMITTEES TO RESPOND TO SANITARY SEWER OVERFLOWS THAT HAVE***
7 ***ENTERED THE MS4.***

8 MS4 permittees under Federal law are required to effectively prohibit non-storm water
9 discharges, such as sanitary sewer overflows (SSOs), to the MS4.¹⁰¹ The EPA has reduced these
10 requirements to regulations that fully sanction the Regional Board's approach to SSO issues.

11 EPA regulations require MS4 permittees to:

12 [implement] procedures to prevent, contain, and respond to spills that may
13 discharge into the municipal separate storm sewer¹⁰²

14 SSOs require coordinated response from a number of municipal departments and districts to
15 minimize the risk of storm water contamination and the threat to public health and the
16 environment. The LA MS4 permit incorporates provisions that ensure that the appropriate
17 response and coordination occurs in circumstances where an SSO may discharge to a storm drain.
18 Petitioners contention that the Regional Board has unlawfully shifted the burden to respond to
19 sanitary sewer over flows (SSOs) from the sanitary sewer authority to the MS4 permittees is
20 without merit.

21 The MS4 permittee who is the owner or operator of the storm drain system has an
22 affirmative responsibility to respond to reported incidents of SSOs so as to prevent entry into the
23 MS4, conveyance through the MS4, and discharge from the MS4. This response should include
24 immediate notification to the sanitary sewer operator to take corrective action to stop the
25 overflow.¹⁰³ Petitioners misunderstand the scope of the MS4 Permittees response to the SSO,
26 which is clearly stated in permit Part 4.F.1.a. MS4 permittees are to notify the sanitary sewer

27 ¹⁰⁰ Permit Finding B.7 references; See also AR Index, Additional Supporting Documents, Item 165.

28 ¹⁰¹ 33 U.S.C. § 1342(p)(3)(B).

¹⁰² 40 C.F.R. § 122.26(d)(2)(iv)(B)(4).

¹⁰³ Order No. 01-182, Part 4.F.1.a.

1 operator promptly so the sanitary sewer operation may initiate actions to stop the SSO.¹⁰⁴ MS4
2 permittees themselves are to take steps within the context of the MS4 to contain the SSO so it
3 does not convey through or discharge from the MS4.¹⁰⁵ The responsibility of the MS4 permittees
4 does not include corrective action to stop the SSO, unless the MS4 permittee also happens to be
5 the sanitary sewer system operator.

6 Most dischargers own sanitary sewer systems that collect sewage within their
7 jurisdictions; such sewers are often referred to as “satellite” sewer systems. As most dischargers
8 do not own wastewater treatment plants, they must contract with an operator of a publicly owned
9 treatment works (POTW) for transmission of sewage from their satellite systems for treatment
10 prior to discharge to waters of the state. Most dischargers contract with the Los Angeles County
11 Sanitation Districts of Los Angeles County or the City of Los Angeles, which operate large
12 transmission, or regional, sanitary sewers as well as the POTWs that treat the sewage. The lead
13 discharger, the County of Los Angeles, also operates a few wastewater treatment plants serving
14 small areas.

15 Regardless of whether or not a discharger owns or operates a publicly owned treatment
16 works (POTW), it most likely does own a satellite system. Regardless of whether or not a
17 discharger contracts with another agency to actually operate that satellite system, it is
18 nevertheless vested with a responsibility to ensure proper management of that satellite system.
19 Proper management of the system includes a requirement for dischargers to implement a response
20 plan for overflows of sewage within their jurisdiction, as set forth in Part 4, section F.1 of the
21 2001 permit. Petitioners are mistaken if they believe that this requirement transfers
22 responsibilities of a POTW to a discharger that does not own the POTW. During the renewal
23 process, this concern was discussed with dischargers, and the Regional Board was careful to
24 avoid language that might imply that a discharger that does not own a POTW or a regional
25 transmission system, must assume responsibility for management and operation of a system. At
26 most, the Regional Board expects such a discharger to respond as specified in Part 4, section 1.a,

27
28 ¹⁰⁴ Order No. 01-182, Part 4.F.1.a.3.

¹⁰⁵ Order No. 01-182, Part 4.F.1.a.2.

1 by investigating any complaints it receives, responding to overflow within its jurisdiction, and
2 notifying appropriate authorities of the incident. This is consistent with one of the goals of the
3 LA MS4 permit and federal law, to effectively prohibit non-storm water discharges to storm
4 drains and waters of the state.

5 ***H. THE DEVELOPMENT PLANNING (SUSMP) REQUIREMENTS IN THE LA MS4***
6 ***PERMIT ARE CONSISTENT WITH APPLICABLE LAW AND LAWFULLY***
7 ***EXPAND BEYOND THE STATE BOARD’S ORDER WQ NO. 2000-11 (LA SUSMP***
8 ***ORDER).***

9 *1. The Application of New Development Controls to Environmentally Sensitive Areas Is*
10 *Properly Justified*

11 Petitioners wrongly claim that the State Board invalidated and prohibited the
12 Environmentally Sensitive Area (ESA) provisions in the LA SUSMP Order. Citing the State
13 Board’s observation in the LA SUSMP Order that ESAs are already subject to extensive
14 regulation under other regulatory programs, Petitioners assert that it is inappropriate for the
15 Regional Board to include development planning controls for ESAs within the LA MS4 permit.¹⁰⁶
16 The State Board’s Order does not, as Petitioners suggest, foreclose inclusion of ESAs as a
17 SUSMP category. The State Board stated:

18 While it may be appropriate to include more stringent controls for
19 developments in ESAs, we also note that such developments are already
20 subject to extensive regulation under other regulatory programs. Moreover,
21 in light of the permit language limiting the SUSMPs to development
22 categories, ESAs are not an appropriate category within the SUSMPs. The
23 Regional Water Board may choose to consider the issue further when it
24 reissues the permit”.¹⁰⁷

25 As is clear from the foregoing passage, the State Board left the issue open for the Regional
26 Board to develop further. The State Board’s primary reason for setting aside the ESA provisions
27 appears to be its observation that ESAs were not listed as a SUSMP developmental category in
28 the LA MS4 permit adopted in 1996. The State Board opined that ESAs were not a development
category but rather locational. Thus for ESAs to be added for the first time during the SUSMP
approval process in 1999 appeared, to the State Board, procedurally suspect even if ESAs

27 ¹⁰⁶ Arcadia et al. Petition at p. 17 The comment erroneously states that the State Board “invalidated portions of the
28 prior SUSMP.” Actually, the State Board did not invalidate the ESA provision in the SUSMP, but rather, determined
that the record failed to support ESAs as a properly- included category within the SUSMP.

¹⁰⁷ State Board Order No. 2000-11, p. 25.

1 warranted more stringent controls.¹⁰⁸

2 The Fact Sheet for the LA MS4 permit includes a technical report prepared by Regional
3 Board staff entitled, “Mitigation of Storm Water Impacts from New Development in
4 Environmentally Sensitive Areas,” Yeager and Swamikannu, 2001, which supports inclusion of
5 ESAs within the SUSMPs categories covered by the LA MS4 permit.¹⁰⁹ The report demonstrates
6 the need to afford ESAs additional protection from storm water and urban runoff through the
7 extension of SUSMPs to projects in ESAs.

8 The Regional Board’s action to extend SUSMPs to ESAs is supported by other State
9 agencies that are co-stewards of California’s natural resources and the environment. For
10 example, the California Coastal Commission has previously commented:¹¹⁰

11 [that the commission] believes that the SUSMPs should be applied to all
12 projects within or adjacent to ESAs. Developmental activities in an around
13 ESAs can have a significant impact on water quality. Many of the ESAs
14 within the jurisdiction of the CCC are directly affected by runoff from
15 adjacent urban areas. ESAs by their very nature require thoughtful
16 consideration throughout the planning and development process.
17 Minimizing impacts of non point source pollution on ESAs should be an
18 integral part of this process.¹¹¹

19 The State Board has already upheld the San Diego County MS4 Permit, which includes
20 similar ESA provisions, without comment. Presumably the ESA challenge in that petition was
21 insubstantial or inappropriate for review.¹¹²

22 Furthermore, the U.S. Fish and Wildlife Service has executed a Memorandum of
23 Agreement with the EPA to coordinate and ensure that NPDES permits issued under Clean Water
24 Act section 402 are not likely to jeopardize the continued existence of any species proposed for
25 listing under the Endangered Species Act or result in the destruction of proposed critical

26 ¹⁰⁸ The Regional Board at that time in arguments did not raise the fact that Permittees in 1999 had included ESAs as a
27 development planning category (called category B) for Permittee review in the countywide Development Planning
28 Model Program. Thus ESAs, as alleged, are not a category unilaterally invented by the Regional Board for
application of new development controls. Rather Permittees first proposed the category and the Regional Board
approved it. See also AR Vol. 2 Item 8 at p.

¹⁰⁹ AR Vol. 11 Item 328 at B-244.

¹¹⁰ See Letter from Deputy Director, California Coastal Commission, to Chief Counsel, State Board, dated September
28, 2000, commenting on the draft LA SUSMP Order.

¹¹¹ California Coastal Commission letter to State Board (Sep. 28, 2000).

¹¹² See State Board Order No. WQ 2001-15, fn. 12.

1 habitat.¹¹³ The purpose of the MOA is to enhance communication between the U.S. Fish and
2 Wildlife Service, the EPA, and states to ensure that water quality standards and NPDES permits
3 will protect endangered and threatened species and critical habitats. It is now a standard
4 provision in EPA-issued MS4 permits to include language that protects federally listed
5 endangered or threatened species and critical habitat from adverse impacts of storm water
6 discharges.¹¹⁴ Undoubtedly, the State Board and Regional Boards, as the NPDES delegated
7 authority for the State, have an affirmative responsibility to ensure that the NPDES permits issued
8 by them, including MS4 permits, are protective of critical habitats established under State and
9 Federal laws.

10 The State Board should also take special note that Permittees included ESAs as a SUSMP
11 category in the SQMP – Developmental Planning Program, in the joint ROWD submitted as
12 application for the reissuance of the LA MS4 permit for the third permit term.¹¹⁵ For Petitioners
13 to now contend that the inclusion of ESAs in the permit constitutes impermissible land use
14 regulation is disingenuous and inconsistent with MEP. Petitioners’ contentions have no merit.

15 *2. The SUSMP Permissibly Covers Non-discretionary Projects.*

16 Petitioners argue that the extension of SUSMP requirements to cover nondiscretionary
17 projects is in violation of the SUSMP Order.¹¹⁶ This statement similarly distorts the State
18 Board’s LA SUSMP Order.

19 In the LA SUSMP Order, the State Board was addressing the narrow issue of whether the
20 1996 LA MS4 permit, for which SUSMPs were being developed, could be construed to cover
21 nondiscretionary projects. The State Board was analyzing, in pertinent part, whether “the
22

23 ¹¹³ 66 Fed. Reg. 11202

24 ¹¹⁴ See MS4 Permit for Government of the District of Columbia (NPDES No. DC0000221) at p. 40. See also EPA’s
Draft Small MS4 General Permit (March 28, 2002) at p. 6 which authorizes discharges only if activities are not likely
to jeopardize the continued existence of any endangered or threatened species or critical habitat.

25 ¹¹⁵ AR Vol. 2 Item 8 at, Development Planning Program

26 ¹¹⁶ Petitioners Arcadia *et al*, P&A at p. 21. The comment also implies that, through a finding concerning
nondiscretionary projects, the Regional Board is somehow attempting “to modify the regulations to CEQA.” (*Ibid.*)
The finding language does not attempt to alter CEQA, but simply reflects a correct statement of law: if local
27 ordinances impose conditions to create decision-making discretion in approving a project, then the subsequent project
action may be discretionary within the meaning of CEQA. The finding does not require the Permittees to undertake
28 any particular course of action. However, the finding does continue by observing that the Regional Board considers
all new development and specified redevelopment to be subject to the SUSMP requirements.

1 inclusion of non-discretionary, or ministerial, projects is inconsistent with the terms of the
2 permit.”¹¹⁷ In answering this question, the State Board concluded that 1996 LA MS4 permit
3 provisions appeared “to link the development requirements for SUSMPs to developments that
4 receive discretionary approval.”¹¹⁸ Because the SUSMPs were an implementation tool for that
5 MS4 permit, the State Board concluded that the SUSMPs “must be consistent with the permit.”
6 (*Ibid.*)

7 Simply put, the State Board’s decision in no way limited the Regional Board’s authority
8 to include nondiscretionary projects in the revised MS4 permit. After concluding that applying
9 SUSMPs to nondiscretionary projects exceeded the scope of the existing permit, the State Board
10 observed that “the limitation of the SUSMPs to discretionary projects may not be sufficiently
11 broad for an effective storm water control program.” (*Ibid.*) The State Board further stated that
12 “The Regional Water Board may consider expanding the development controls beyond
13 [California Environmental Quality Act (CEQA)] discretionary projects when it reissues the
14 permit.”¹¹⁹

15 The Regional Board revisited the issue of nondiscretionary projects, and has found
16 adequate justification to expand the SUSMP provisions to nondiscretionary projects. The
17 Regional Board staff prepared a detailed report that provides the justification for extending the
18 SUSMP requirements to nondiscretionary projects in order to improve the quality of storm water
19 discharges.¹²⁰ The reissued LA MS4 permit removes the “discretionary” limitation that appeared
20 in the prior permit thereby extending SUSMP requirements to nondiscretionary projects. The
21 State Board should take note that some of the Permittees have already implemented development
22 planning procedures to review CEQA non-discretionary projects for SUSMP development
23 planning controls.¹²¹ Thus for some Petitioners to claim that CEQA exempts non-discretionary

24 _____
¹¹⁷ State Board Order No. 2000-11 at p. 25.

25 ¹¹⁸ State Board Order No. 2000-11 at p. 26.

26 ¹¹⁹ *Ibid.*

27 ¹²⁰ AR Vol. 11 Item 328 at B-232 (Storm Water Mitigation Requirements for Priority Planning Projects for the
Protection of Water Quality,” Fisher and Swamikannu, 2001).

28 ¹²¹ AR Vol. 6 Item 160 at 195 where the City of Los Angeles Chief Legislative Analyst in a memorandum to the City
Council supports extension to non-discretionary projects. Also See, AR Vol. 11 Item 328 at p. F-32. Los Angeles
County Announcement sharing development planning project review among Land Development (for discretionary
projects) and Environmental Programs and Building and Safety (for non-discretionary projects).

1 projects and thus permittees have no ability or authority to review all development projects to
2 mitigate storm water impacts lacks merit and defies MEP.

3 *3. The Regional Board Has Properly Allowed For “Regional Solutions”*

4 Some petitioners contend that State Board directed the Regional Board to develop
5 “regional solutions” in the LA SUSMP Order. This statement misinterprets the State Boards
6 recommendation. The State Board said:

7 We recommend that the cities and the County, along with other interested
8 agencies, works to develop regional solutions so that individual discharges
9 are not forced to create numerous small scale projects. While the SUSMPs
10 are an appropriate means of mitigating storm water discharges, we also
11 encourage innovative regional approaches¹²²

12 and again,

13 As a long-term strategy, municipal storm water discharges should work to
14 establish regional mitigation facilities, which may be most cost-effective
15 and more technically effective than mitigation structures at individual
16 developments.¹²³

17 It is clear from the above passages that the responsibility to develop and propose “regional
18 solutions” is with the Permittees and not the Regional Board. Petitioners wrongly allege that they
19 proposed a specific plan to develop “regional solutions” that was ignored by the Regional
20 Board.¹²⁴ A plain reading of the proposed regional solution would indicate that it is a tentative
21 plan to establish a regional solution mitigation funding mechanism with escape and indemnity
22 clauses inconsistent with State and Federal law.¹²⁵ Petitioners’ proposal is no more than a vague
23 promise to do something regionally at an undefined time in the future should funds became
24 available.

25 To date, no regional solutions have been proposed by Permittees, including the Principal
26 Permittee, in lieu of the SUSMP approach. To the extent that Petitioners maintain that State
27 Board’s LA SUSMP Order encouraged regional solutions, the Regional Board staff concurs.
28 Specifically, the State Board encouraged the Permittees to develop such projects. However, there
29 is no requirement that the Regional Board itself develop regional solutions. Nor is there any

122 State Board Order No. 2000-11 at p.26.

123 *Ibid.*

124 See Petitioners Arcadia et al. P& A at p. 22.

125 AR Vol. 6 Item. 160 at p. 622.

1 requirement that the Regional Board adopt proposed regional solutions, in place of SUSMP
2 requirements. Rather, it is the burden of the Permittees to develop and present workable,
3 acceptable regional programs that meet or exceed the requirements of the LA MS4 permit in
4 order to be considered by the Regional Board. At this time, the Permittees have not submitted
5 any specific proposals for regional solutions. The Regional Board itself maintains broad
6 discretion to consider proposed programs in the future, and has established some general
7 principles for consideration of regional solutions in the permit at Part 4.D.10.

8 Perhaps, the best example of what criteria would define acceptable “regional solutions”
9 comes from the State of Florida which has been permitting “regional storm water facilities” to
10 mitigate storm water pollution since 1982. These criteria include that, (i) the regional facility will
11 provide treatment equivalent to either retention, or detention with filtration, of the runoff from the
12 first one inch of rainfall; or, as an option, for facilities with a drainage area less than 100 acres,
13 the first one inch of runoff, (ii) the regional facility is designed to meet the criteria for projected
14 future landuse conditions; (iii) adequate provisions have been made for operation and
15 maintenance of the regional facility; and (iv) reasonable assurance is provided that discharges
16 from the regional facility will not cause pollution in violation of the State of Florida’s water
17 quality standards.¹²⁶ Nothing similar to this extent of specificity or even close has been proposed
18 to the Regional Board as yet for consideration.

19 Petitioners challenges should be set aside because the claims have no merit.

20 *4. The Definition of Redevelopment Is Appropriate*

21 Some Petitioners contend that the Regional Board has overly broadened the definition of
22 “redevelopment” as adopted by the State Board in the LA SUSMP decision. In that decision, the
23 State Board made minor edits to the Regional Board definition and deleted ambiguous terms that
24 might be interpreted to trigger requirements even for simple activities such as exterior remodeling
25 or roof replacement. The State Board definition reads,

26 Redevelopment means, on an already developed site, the creation or
27 addition of at least 5,000 square feet of impervious surfaces.
28 Redevelopment includes, but is not limited to: expansion of a building

¹²⁶ See FL Admin. Code § 62-25.040.

1 footprint or addition or replacement of a structure; structural development
2 including an increase in gross floor area and/or exterior construction or
3 remodeling; replacement of impervious surface that is not part of a routine
4 maintenance activity; and land disturbing activities related with structural
5 or impervious surfaces. Where redevelopment results in an increase of less
6 than fifty percent of the impervious surfaces of a previously existing
7 development, and the existing development was not subject to SUSMPs,
8 the design standards apply only to the addition, and not the entire
9 development.¹²⁷

10 The Regional Board tracked this definition but clarified that “creation” should encompass
11 the situation where the building footprint and other impervious surfaces are being torn down and
12 replaced. A contrary interpretation would defeat the objective of seeking opportunities to
13 mitigate storm water pollution when sites are redeveloped.¹²⁸ The definition that was adopted by
14 the Regional Board in January 2000 expressly intended to include replacement of existing
15 impervious surfaces.¹²⁹ Our review of the definition of “Redevelopment” by leading storm water
16 programs around the nation and EPAs interpretation indicates that the term includes the situation
17 where impervious surfaces or building footprints are ‘replaced’.¹³⁰

18 Redevelopment projects have the same requirements as new development projects so as to
19 minimize the adverse impacts of storm water runoff from impervious surfaces. In order not to
20 discourage redevelopment, replaced surfaces are subject to mitigation only if impervious surface
21 area thresholds are exceeded. However, if the redevelopment project scope exceeds thresholds, it
22 is reasonable to require that storm water runoff be mitigated to current mitigation criteria. Such
23 an expectation is consistent with other utility and municipal code standards enforced by
24 municipalities. For example when significant alterations to a property or structure is made, local
25 governments often require the site to be brought up to new building code requirements.

26 ¹²⁷ Order No. 2000-11.

27 ¹²⁸ AR Transcript of Dec. 13, 2001, Hearing at p. 18. Regional Board staff articulates that the Petitioner’s
28 interpretation of “redevelopment” would result in storm water discharge quality in Los Angeles County not getting
29 better over time, but only less worse because it is nearly built out.

30 ¹²⁹ AR Transcript of Jan. 26, 2000, SUSMP Hearing at p. 12. Regional Board Executive Officer comments that the
effect of SUSMPs initially will be small but through the years as more property is redeveloped and retrofitted, the
region will gain the benefit of enhanced treatment.

¹³⁰ AR In the State of Washington, new, replaced, or total of new plus replaced surfaces of 2,000 square feet or more
are subject to redevelopment requirements. AR The State of Maryland defines redevelopment as, “Any construction,
alteration, or improvement exceeding 5,000 square feet of land disturbance.....” See also 64 Fed. Reg. 68760, where
the U.S. EPA interprets redevelopment to refer to alterations of a property that change the “footprint” of a site or
building in such a way that it results in the disturbance of land.

1 Petitioners also claim that the Regional Board’s definition is invalid because the EPA’s
2 definition and thresholds for redevelopment in its Phase II regulations are binding.¹³¹ This claim
3 is incorrect. First the EPA merely states the intended meaning of “Redevelopment” for Phase II
4 MS4s. Further, the State Board has previously determined that the Phase II regulations do not
5 apply to the LA MS4 permit.¹³² The State Board and Regional Boards would be entirely
6 consistent with Federal regulations if they are to apply different redevelopment thresholds for
7 Phase I and Phase II MS4s.¹³³

8 The Regional Board revised the definition of “Redevelopment” to clarify its intended
9 application and end ambiguous interpretations. The definition now reads,

10 “Redevelopment” means land-disturbing activity that results in the
11 creation, addition, or replacement of 5,000 square feet or more of
12 impervious surface area on an already developed site. Redevelopment
13 includes, but is not limited to: the expansion of a building footprint;
14 addition or replacement of a structure; replacement of impervious surface
15 area that is not part of a routine maintenance activity; and land disturbing
16 activities related to structural or impervious surfaces.

17 The portion of the area of redevelopment to be mitigated as well as a provision excluding
18 the redevelopment of single family structures is incorporated directly in the permit.¹³⁴ These
19 revisions ensure that the common homeowner is not burdened with these requirements when
20 making alterations to the property.¹³⁵ The operative phrase now becomes “land disturbing
21 activity” so that roof replacement or exterior remodeling by itself would not trigger storm water
22 mitigation requirements, as falsely claimed by Petitioners.¹³⁶

23 The revised definition of “Redevelopment” is clear and proper.

24 ***I. THE PERMIT PROVISION TO UPDATE OF GENERAL PLANS TO***

25 ¹³¹ 64 Fed. Reg. 68760 wherein the U.S. EPA states its intended meaning of “redevelopment” for Phase II MS4s.

26 ¹³² State Board Order No. 2000-11 at p. 19. See Footnote 45, which states that Phase II regulations do not apply to the permit.

27 ¹³³ See Memorandum on the LA SUSMP Order from State Board Chief Counsel to Regional Board Executive Officers dated Dec. 26, 2000. Footnote 1 states, “The Order did not address Phase II requirements, which may be different than Phase I requirements.”

28 ¹³⁴ See LA MS4 permit Pt 4.D.a and 4.D.c.

¹³⁵ The State of Maryland defines “Redevelopment” to most closely resemble the Regional Board’s definition in its 5,000 square feet threshold and also specifically excludes single family structures from the new development requirements.

¹³⁶ Petitioner Arcadia *et al.* comment in P& A at p. 20 that the Respondent staff’s explanation was “incomprehensible” on why roof replacement would not necessarily trigger requirements but that the foot-print would. It is because the latter disturbs land and not the former.

1 ***INCORPORATE STORM WATER PROVISIONS IS APPROPRIATE***

2 Petitioners contend that the Regional Board is unlawfully requiring the update of General
3 Plans to include storm water pollution considerations when General Plan elements are updated.
4 EPA regulations require that MS4 Permittees implement,

5 planning procedures including a comprehensive master plan to control after
6 construction is completed, the discharge of storm water from municipal
7 separate storm sewer systems which receive discharges from development
8 and significant redevelopment¹³⁷

9 EPA Guidelines note that MS4 Permittees may accomplish this requirement by,

10 incorporation of land use goals and objectives into a plan document or map
11 plan.....Comprehensive or master plans are often non-binding. They
12 provide support and direction to local officials that have the authority to
13 make land use decisions.¹³⁸

14 In California, the comprehensive plan document for most municipalities is the General
15 Plan. The Development Planning Program submitted jointly by Permittees as part of the SQMP
16 with the ROWD includes a General Plan update component.¹³⁹ Under the MS4 permitting
17 scheme, part or all of the SQMP submitted with a satisfactory application would be expected to
18 be integrated into the final MS4 Permit as permit conditions.¹⁴⁰ This is what the Regional Board
19 did here. It is absurd for Petitioners to claim that what they proposed in the MS4 application as
20 MEP suddenly becomes impermissible land use regulation when the permitting authority
21 integrates the component into the permit. Even so, Permittees have the flexibility to substitute the
22 General Plan update provision with an equivalent long-term planning provision under permit Pt.
23 4.A.¹⁴¹

24 Furthermore, the General Plan update provision was already a permit limitation integrated
25 into the 1996 LA MS4 permit.¹⁴² None of the Petitioners challenged the inclusion in 1996. The
26 only difference now is that the Regional Board requires notice to the Regional Board under Cal.

27 ¹³⁷ 55 Fed. Reg. 47990, 48054.

28 ¹³⁸ AR Vol. 6 Item. 160 at p. 183. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications
for Discharges from Municipal Separate Storm Sewer Systems, EPA Office of Water (1992), EPA 833-B-92-002.

¹³⁹ AR Vol. 2 Item 8, at

¹⁴⁰ *In Re: City of Irving Municipal Separate Storm Sewer System*, NPDES Appeal No. 00-18 (EAB, July 16, 2001) at
p. 13.

¹⁴¹ AR Vol.11 Item 335 at p.

¹⁴² AR Vol. 6 Item 160 at p.482.

1 Govt. Code § 675350 when General Plan elements are being proposed for updates. This will
2 enable the Regional Board to verify if storm water issues are being integrated into the update for
3 specified elements.

4 The intent of the planning procedure requirements is to ensure that Permittees consider
5 storm water issues during general planning, when opportunities to mitigate storm water impacts
6 can be best devised. The General Plan update provision does not conflict with the statutory or
7 regulatory requirements under general planning law. Petitioners' contentions have no merit.

8 ***J. THE UPDATE OF CEQA GUIDELINES TO INCLUDE STORM WATER***
9 ***CONSIDERATIONS IS APPROPRIATE***

10 Petitioners contend that the Regional Board is unlawfully requiring revisions to CEQA
11 Guidelines. Nothing can be further from the truth. EPA regulations require that MS4 Permittees
12 implement site-planning procedures that incorporate consideration of potential storm water
13 quality impacts.¹⁴³ EPA MS4 Guidelines note:

14 Storm water management program goals should be reviewed during
15 planning processes that guide development to appropriate locations and
16 steer intensive land uses away from sensitive environments.¹⁴⁴

17 The purpose of this provision is to ensure that the Permittee and the developer address
18 storm water discharge impact issues early in the project design phase so that potential water
19 quality impacts can be minimized.¹⁴⁵ In California, the mechanism for municipalities and
20 developers to consider storm water issues and mitigate any adverse effects is through the CEQA
21 process. The Regional Board's integration into the final MS4 Permit, a component for planning
22 procedures that was proposed by the Permittees in their application as MEP, is totally consistent
23 with the MS4 permitting scheme.¹⁴⁶ Also, like the General Plan update requirement, the CEQA
24 document update was a permit limitation in the 1996 LA MS4 permit,¹⁴⁷ which was not
25 challenged by any of the Petitioners at that time.

26 ¹⁴³ See 40 C.F.R. 122.26(d)(2)(iv)(D)(1).

27 ¹⁴⁴ See, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from
Municipal Separate Storm Sewer Systems, (1992), Office of Water, EPA No. 833-B-92-002, at p.6-4

28 ¹⁴⁵ AR Vol. 6 Item. 160 at p. 187. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications
for Discharges from Municipal Separate Storm Sewer Systems, EPA OW (1992), EPA 833-B-92-002.

¹⁴⁶ *Supra* See Footnote 52.

¹⁴⁷ AR Vol. 6 Item 160 at p. 482

1 The LA MS4 permit makes clear that the Permittees are not required to revise the CEQA
2 Guidelines, but rather it ensures that Permittees review and require developers to consider storm
3 water issues during the CEQA process. The intent of the CEQA document update requirements is
4 to have Permittees review storm water issues during project planning, when opportunities to
5 mitigate storm water impacts can best be devised. The CEQA document update provision does
6 not conflict with the statutory and regulatory requirements under CEQA. Petitioners contentions
7 have no merit.

8 **IV. CONCLUSION**

9 The Regional Board had ample authority and justification to establish the permit
10 conditions under review by State Board. For the reasons set forth herein and in the underlying
11 administrative record, the terms and conditions of Regional Board Order No. 01-182 should be
12 upheld in their entirety.

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